TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
PETITIONER,

vs.

SCANLON, DISTRICT DIRECTOR OF
INTERNAL REVENUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 22, 1959

CERTIORARI GRANTED NOVEMBER 9, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
PETITIONER,

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 18, 1959

[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Case No. 25635

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioner-Appellant,

—vs.—

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK and ACME CASSA; INC., Respondents-Appellees.

On Appeal From the United States District Court for the Southern District of New York

APPELLANT'S APPENDIX

Docket Entries

Mar. 4, 1959—Complaint Filed and Summons Issued (Should be Order to Show Cause and Petition Filed and Served).

Mar. 17, 1959—Filed Show Cause Order to Quash Notices of Levy. Returnable 3/31/59.

Apr. 16, 1959—Filed Affidavit of A. Foreman (Acme Cassa, Inc.) Supporting Motion of Plaintiff New Hampshire.

Apr. 16, 1959—Filed Opposing Affidavit to Quash Levy.

Apr. 16, 1959—Filed Copy of Opinion, No. 25,045, Petition Dismissed. It is so Ordered. Cashin, J. Judgment Entered. Clerk Mailed Notice of Entry.

Apr. 21, 1959—Filed Notice of Appeal. Mailed Copies to U. S. Attorney, Charles H. Tenney, M. Carl Levine, Morgulas & Foreman.

Order to Show Cause and Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioner,

—against—

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK, and ACME CASSA, INC.,
Respondents.

Upon the annexed petition of New Hampshire Fire Insurance Company, together with the Exhibit attached thereto,

Let respondents, Thomas E. Scanlon, District Director of Internal Revenue; City of New York, and Acme Cassa, Inc., and each of them, show cause at a Motion Term of this Court to be held in Room 506 of the United States Courthouse, Foley Square, New York 7, New York, on the 31st day of March, 1959, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be granted herein, quashing the Notice of Levy No. B-970 dated October 16, 1957 and the Notice of Levy No. B-978 dated October 23, 1957 and the Notice of Levy No. B-1241 dated February 21, 1958 and the Notice of Levy (no number) dated May 20, 1958, heretofore served upon and filed with respondent City of New York at various times between November 1,

1957 and May 21, 1958, inclusive, insofar as said Notices of Levy restrained and prohibited the respondent City of New York to deliver to New Hampshire Fire Insurance Company, its warrant No. 228268 in the sum of $68,015.50 due since November 26, 1957 as a partial payment under a written contract between the respondent Acme Cassa, Inc. and the respondent City of New York, known as Contract No. B-254-155 (Comptroller's No. 182559) and which is the property of New Hampshire Fire Insurance Company.

Sufficient reason appearing therefor, it is

ORDERED that service of a copy of this Order to Show Cause, together with the Petition and Exhibit annexed thereto, upon each of the respondents in the manner provided by the Federal Rules of Civil Procedure on or before March 25th, 1959, shall be deemed good and sufficient service.

Dated, New York, N. Y.
March 4, 1959.

s/ DAVID N. EDELSTEIN
United States District Judge

Order to Show Cause and Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON District Director of Internal Revenue, CITY OF NEW YORK, and ACME CASSA, INC.,

Respondents.

The petitioner, New Hampshire Fire Insurance Company, for its petition respectfully shows:

1. At all times hereinafter mentioned, petitioner was engaged in the business of acting as a compensated surety having its principal place of business at 1750 Elm Street, City of Manchester, State of New Hampshire (hereinafter referred to as "New Hampshire").

2. At all times hereinafter mentioned, the respondent City of New York (hereinafter referred to as "City") was and now is a Municipal Corporation organized and existing under the laws of the State of New York.

3. At all times hereinafter mentioned, The Department of Parks of the City of New York was and is now a fully constituted Department of the City.

4. At all times hereinafter mentioned, the respondent Acme Cassa, Inc. (hereinafter referred to as "Acme Cas-

sa") is a domestic corporation, organized under the laws of the State of New York, having its principal place of business at 60 Wyandanch Avenue, Babylon, New York.

5. This action arises under the Internal Revenue Laws of the United States, more particularly, 28 U. S. C. §§ 1340, 2463 and also under 26 U. S. C. §6321, et seq.

6. On or about June 21, 1956, Acme Cassa entered into a written contract bearing No. B254-155 Comptroller's No. 182559 with the City (Department of Parks) for the construction of a playground adjacent to the Wingate High School, located on West Kingston Avenue, Borough of Brooklyn, New York, for the contract price of $356,428.00, subject to unit prices for certain elements of construction.

7. As a condition of the execution of the aforementioned contract, Acme Cassa was required to and did deliver to the City, a certain performance bond executed by New Hampshire, as surety, on behalf of Acme Cassa, as principal, in favor of the City, as obligee, in the penal amount of $356,428.00, and a payment bond executed by New Hampshire, as surety, on behalf of Acme Cassa, as principal, in favor of the City, as obligee, in the penal amount of $356,428.00.

8. To induce New Hampshire to become surety for Acme Cassa, it executed a certain written agreement dated June 21, 1956, a copy of which is annexed hereto as Exhibit "A" and incorporated herein as though fully set forth at length.

9. Acme Cassa entered upon the performance of the work required under its agreement with the City and pur-

suant thereto, from time to time, submitted requisitions for partial payment of moneys due for work performed and was paid the sum of $246,071.10.

10. Acme Cassa, because of financial difficulties, became unable to proceed to complete the work required to be performed by it, and demand was made upon petitioner, New Hampshire, as surety, to complete the work and to pay various unpaid suppliers of labor and material for work and material supplied by them in connection with the prosecution of the work required to be performed.

11. Upon information and belief, on November 1, 1957, a Notice of Lien for various taxes totalling $16,126.16 claimed to be due from Acme Cassa together with a Notice of Levy dated October 17, 1957, bearing No. B-970 was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

12. Upon information and belief, on November 1, 1957, a Notice of Lien for various taxes totalling $23,452.83 claimed to be due from Acme Cassa together with a Notice of Levy dated October 27, 1957, bearing No. B-978 was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

13. Upon information and belief, on March 4, 1958, a Notice of Lien for various taxes totalling $13,437.18 claimed to be due from Acme Cassa together with a Notice of Levy dated February 21, 1958, bearing No. B-1241 was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

14. Upon information and belief, on May 21, 1958, a Notice of Lien for various taxes totalling $9,250.20 claimed to be due from Acme Cassa together with a Notice of Levy dated May 20, 1958 (no number) was caused to be filed by respondent Thomas E. Scanlon, District Director of Internal Revenue, in the appropriate office of the respondent City.

15. New Hampsire, in exoneration of its responsibility as surety under the aforementioned payment and performance bonds, in accordance with the demand made upon it, has paid to suppliers of labor and material within the coverage of its payment bond, and for completion of the work required to be performed under its performance bond, the sum of $82,990.17 as at November 25, 1958.

16. Since January 7, 1958, the City had available for delivery to New Hampshire its warrant bearing No. 29520 in the sum of $68,015.50 which it is willing to deliver to New Hampshire, except for the restraint imposed on it by law by the four Notices of Levy heretofore referred to.

17. The respondent City by its Treasurer has refused to deliver the aforesaid warrant No. 29520 in the amount of $68,015.50, and New Hampshire is informed and believes will refuse to deliver the warrant for the final payment in the amount of $35,936.80 because of the adverse claims thereto asserted by the respondent, Thomas E. Scanlon, as District Director of Internal Revenue under all of the aforementioned Notices of Levy.

18. New Hampshire is informed and believes that there was paid on account of the aforementioned Tax indebtedness due from Acme Cassa, various sums, so that the

present unpaid balance due under the aforementioned Notices of Levy is approximately $35,000.00, inclusive of accruing interest.

19. Plaintiff is informed and believes that in addition to the aforesaid sum of $68,015.50, there is also available for delivery by City, the sum of $15,021.00 due to the respondent Acme Cassa, or its surety Aetna Casualty and Surety Company, in connection with other work, which the City refusees to pay by reason of the adverse claim of the respondent, Thomas E. Scanlon, as District Director of Internal Revenue under the aforementioned Notices of Levy.

20. New Hampshire by reason of its position as a completing surety for Acme Cassa or by reason of the written assignment executed by Acme Cassa, annexed hereto as Exhibit "A" is entitled to receive the warrant in the amount of $68,015.50 free of the claim of the liens asserted by Thomas E. Scanlon, as District Director of Internal Revenue under any of the aforedescribed Notices of Levy.

21. Heretofore, on January 21, 1959 pursuant to § 6325 (b)(2)(B) of the Internal Revenue Code of 1954, petitioner made application for the partial discharge from the liens heretofore referred to of the sum of $28,515.50 of the sum of $68,015.50 being the amount of the warrant of the City of New York, available for delivery to New Hampshire.

22. The aforementioned Application was granted and on or about February 3, 1959, respondent Thomas E. Scanlon forwarded to the Treasury of the City of New York, his written consent to the payment of the sum of $28,515.50

from the total of $68,015.50 represented by the aforementioned warrant No. 29520.

WHEREFORE, New Hampshire Fire Insurance Company prays that the Notices of Levy described herein, heretofore served and filed upon the respondent City of New York be quashed insofar as they restrain and prohibit the payment by respondent City of New York to New Hampshire Fire Insurance Company of the sum of $68,015.50 or in the alternative, that the aforementioned Notices of Levy be quashed, insofar as they restrain and prohibit payment by respondent City of New York of all sums in excess of the amount due and owing by Acme Cassa, Inc. to the respondent Thomas E. Scanlon, District Director of Internal Revenue.

Dated, New York, N. Y.
March 4th, 1959

ENGELMAN AND HART

By MYRON ENGELMAN
A member of the firm
Attorneys for Petitioner
Office & P. O. Address
10 East 40th Street
Borough of Manhattan
City of New York.

Order to Show Cause and Petition

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK, and ACME CASSA, INC.,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MYRON ENGELMAN, being duly sworn, deposes and says:—

I am a member of the firm of Engelman and Hart, attorneys for petitioner and I am fully familiar with the facts. I am an attorney at law, and make this affidavit in conformity with Rule 10(b) of the General Rules of the United States District Court for the Southern District of New York.

No previous application for the relief sought by the annexed order to show cause and petition has been heretofore made.

(Sworn to by Myron Engelman on March 4, 1959.)

Affidavit in Opposition to Motion to Quash Notices of Levy

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE COMPANY, *Petitioner,* —*against*— THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK, and ACME CASSA, INC., *Respondents.*	Civ. 143-306

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:

Sherman J. Saxl being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of Arthur H. Christy, United States Attorney for the Southern District of New York and as such I am familiar with the above captioned matter.

2. This affidavit is submitted in opposition to petitioner's motion to quash the notice of levy number B-970, dated October 16, 1957, the notice of levy number B-978, dated October 23, 1957, the notice of levy number B-1241, dated February 21, 1598, the notice of levy (no number) dated May 20, 1958, heretofore served upon and filed with respondent City of New York at various times between November 1, 1957 and May 21, 1958.

Affidavit in Opposition to Motion to Quash Notices of Levy

3. On information and belief, the respondent, Thomas E. Scanlon, is a Government official who has his office and official place of business at 210 Livingston Street, Brooklyn 1, N. Y. in the Eastern District of New York.

4. No summons and complaint has ever been served upon the United States Attorney for the Southern District of New York and upon information and belief; no summons and complaint has ever been served upon the Attorney General of the United States, or upon Thomas E. Scanlon, the respondent herein.

5. No action has been taken by the United States to reduce to possession the funds against which the above mentioned liens have been filed.

6. On information and belief, Acme Cassa, Inc. assigned all of its rights to payment from the City of New York to the petitioner herein, on February 24, 1959, and said assignment was approved by the Department of Parks on February 25, 1959 and was filed with the Comptroller's Office of the City of New York, on March 3, 1959.

(Sworn to by Sherman J. Saxl on March 30th, 1959.)

Affidavit of A. Foreman

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK; and ACME CASSA, INC.,

Respondents.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Albert Foreman, being duly sworn, deposes and says:

I am a member of the firm of M. Carl Levine, Morgulas & Foreman, attorneys for Acme Cassa, Inc., one of the respondents above named, and am fully familiar with the facts.

I am authorized to advise the Court that our client, Acme Cassa, Inc., has no objection to the granting of the motion of the New Hampshire Fire Insurance Company.

(Sworn to by Albert Foreman on April 1, 1959.)

Opinion Dismissing Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner,

—against—

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK, and ACME CASSA, INC.,

Respondents.

Ci. 143-306

CASHIN, *D. J.*

This is a summary proceeding brought on by petition and order to show cause seeking to have quashed, at least in part, notices of levy served and filed upon respondent City of New York by respondent Thomas E. Scanlon, a District Director of Internal Revenue. The petitioner asserts a right prior to that of the Director to funds in the hands of the City of New York due and owing under a construction contract between respondent Acme Cassa, Inc. and the City. The petitioner alleges expenditures, under the payment and performance bonds, of $82,990.17 as of November 25, 1958. There is admittedly due and owing by the City under the contract at the present time and the sum of $68,015.50, and there is soon to be due and owing the further sum of $35,930.80. Neither the City nor Acme Cassa, Inc. interpose any objection to the relief sought.

I am in agreement with the contention of the Government that the District Court has no jurisdiction to determine the respective rights of the petitioner and the Government to the funds in the hands of the City in a summary proceeding. Petitioner argues that the provisions of 28 U. S. C. A. § 2463 give the Court such jurisdiction. That Section reads as follows:—

> "All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

The petitioner argues that the notices of levy filed with the City have the effect of "detaining" the funds. Since they are so detained, this argument goes on, the funds are "in the custody of the law" and thus subject to the order of the Court.

For the purposes of this motion I will assume that the funds have been detained within the meaning of Section 2463 (cf. *Seattle Association of Credit Men* v. *U. S.* (9 Cir. 1957) 240 F. 2d 906). Despite this assumption I feel that this summary proceeding does not lie in view of the authority of *In Re Behrens* (2 Cir. 1930) 39 F. 2d 561 and *Goldman* v. *American Dealers Service* (2 Cir. 1943) 135 F. 2d 398. Both of these cases considered the availability of summary proceedings under the then Title 28 U. S. C. A. § 747, which Section has been recodified in *haec verba* in the present 28 U. S. C. A. § 2463. In both cases it was held that despite the fact that tangible personal property seized under revenue laws was thus in the custody of the law, summary proceedings for its recovery would not lie. It is true that in both those cases the parties from whom the seizure took place were also the parties who were allegedly liable to the Gov-

ernment and that, here, the petition is brought on by a third party. However, I cannot see where this distinction is one of substance. If Section 2463 brings the property within the custody of the law so as to make a summary proceeding for a turn-over order available, there would appear to be no more authority to allow proceedings to be brought by an owner from whom it was not seized than by an owner from whom it was. To the extent that *Raffaele* v. *Granger* (3 Cir. 1952) 196 F. 2d 620, and *Rothensies* v. *Ullman* (3 Cir. 1940) 110 F. 2d 590, hold contrary, I decline to follow them. In both the *Behrens* and *Goldman* cases, supra, the Court held that the denial of the relief sought should be conditioned on the Government instituting proper proceedings to test the merits of the controversy seasonably. No such condition is necessary in denying the instant application because the petitioner itself can institute a plenary suit for the recovery of the property if it so chooses.

The petition is dismissed.

It is so ordered.

Dated: New York, N. Y.
April 16th, 1959.

JOHN W. CASHIN
United States District Judge

Judgment entered

HERBERT A. CHARLSON
4/16/59 Clerk

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 339—October Term, 1958.

(Argued June 10, 1959 Decided June 22, 1959.)

Docket No. 25635

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner-Appellant;

—v.—

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK and ACME CASSA, INC.,

Respondents-Appellees.

Before:

HINCKS and MOORE, *Circuit Judges*, and
SMITH, *District Judge*.

The United States District Court for the Southern District of New York, John W. Cashin, *Judge*, held that it had no jurisdiction under Title 28, U. S. C. A., section 2463, in summary proceedings to vacate notices of levy filed by respondent Director of Internal Revenue against an alleged debtor of a taxpayer. The petitioner appealed. *Affirmed*.

JACK HART, of Engelman and Hart, New York, N. Y. (Engelman and Hart, New York, N. Y., on the brief), *for appellant*.

WILLIAM ELLIS, Asst. U. S. Atty., S. D. N. Y., New York, N. Y. (S. Hazard Gillespie, Jr., U. S. Atty., and Sherman J. Saxl, Asst. U. S. Atty., S. D. N. Y., New York, N. Y., on the brief), *for Thomas E. Scanlon, respondent-appellee.*

PER CURIAM:

Upon the opinion of Judge Cashin, D. C. S. D. N. Y., April 16, 1959, [172] F. Supp. [392], the order is affirmed.

[fol. 19]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW HAMPSHIRE FIRE INS. COMPANY, Petitioner-Appellant

-v.-

THOMAS E. SCANLON, Dist. Dir. of Internal Revenue, CITY OF NEW YORK and ACME CASSA, INC., Respondents-Appellees

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JUDGMENT—June 22, 1959

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk

[fol. 20] [File endorsement omitted]

[fol. 21] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 22]

SUPREME COURT OF THE UNITED STATES

No. 339, October Term, 1959.

NEW HAMPSHIRE FIRE INSURANCE CO., Petitioner,

v.

SCANLON, District Director of Internal Revenue, et al.

ORDER ALLOWING CERTIORARI—November 9, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 22 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 339

NEW HAMPSHIRE FIRE INSURANCE COMPANY,

Petitioner,

v.

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK and ACME CASSA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MYRON ENGELMAN,
10 East 40th Street
New York, N. Y.
Counsel for Petitioner,
New Hampshire Fire Insurance Company.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioner,

vs.

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK and ACME CASSA, INC.,
Respondents.

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

New Hampshire Fire Insurance Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 23, 1959.

OPINIONS BELOW

The opinion of the District Court is reported in 172 F. Supp. 392 and is contained in the appendix record printed for the Court of Appeals filed herewith pursuant to Rule 21, at page 14a. The opinion of the Circuit Court of Appeals is contained in the appendix filed herewith, at page 17a.

JURISDICTION

The judgment of the Circuit Court of Appeals is dated and was entered on June 22, 1959. (Appendix p. 19a) The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTION PRESENTED FOR REVIEW

Do the United States District Courts have jurisdiction under 62 Stat. 974, 28 U. S. C. § 2463 to determine, in a summary proceeding instituted by order to show cause and petition, the rights to property improperly detained under the alleged authority of the revenue laws?

STATUTE INVOLVED

The statute involved is 62 Stat. 974, 28 U. S. C. § 2463 which provides:

> "§ 2463. Property taken under revenue law not repleviable.
>
> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

STATEMENT OF THE CASE

The petition alleges that a construction contract was entered between Acme Cassa, Inc., a contractor, and the City of New York. A condition to the making of the contract was the furnishing of performance and payment bonds

by the contractor. The petitioner herein, New Hampshire Fire Insurance Company, a surety company, executed these bonds, as surety, on behalf of Acme Cassa, Inc., as principal, in favor of the City of New York, as obligee.

After commencement of performance of the contract, Acme Cassa, Inc. became financially unable to continue performance or to pay its subcontractors and suppliers of material and labor. Petitioner, as surety, financed completion of the contract and made payments to unpaid subcontractors, laborers and suppliers. As of November 25, 1958 these payments totalled $82,990.17.

Since January 7, 1958, the City of New York has had available for delivery to petitioner a warrant in the amount of $68,015.50. Another warrant for the final contract payment in the amount of $35,930.80 will be issued by the City of New York in the future. The available warrant has not been delivered to petitioner because of certain notices of liens and notices of levy served by Thomas E. Scanlon, District Director of Internal Revenue upon the City of New York. These notices of liens and levies arise out of unpaid taxes, totalling $39,004.67 as of January 21, 1959, claimed to be due from the contractor, Acme Cassa, Inc. Respondent Thomas E. Scanlon consented to the payment to the surety of $28,515.50 from the $68,015.50 warrant.

In its petition to the District Court the petitioner herein claimed (1) that it is clear that under the law of the State of New York, it is subrogated to the rights of the City of New York, its obligee, to the unpaid contract balance and that, as subrogee, it is entitled to the contract balance in question against any claims of the Government based on unpaid taxes of its principal; and (2) that 62 Stat. 974, 28 U. S. C. § 2463 places its property which has been improperly detained by the District Director of Internal Revenue in the custody of the law and that, upon its petition, the

District Court must render an appropriate order or decree relating to the disposition of the property.[1]

Upon the petition the District Court issued an order directing respondents Thomas E. Scanlon, the City of New York and Acme Cassa, Inc. to show cause why the above mentioned Notices of Levy should not be quashed (Appendix p. 2a). Only respondent Scanlon appeared in opposition to the petition.

The District Court, relying upon *In re Behrens*, 39 F. 2d 561 (2nd Cir. 1930) and *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (2d Cir. 1943), dismissed the petition, holding that the District Court had no jurisdiction in a summary proceeding to adjudicate rights to the property even though the property was placed by statute in the custody of the law. In so holding the District Judge stated:

> "To the extent that *Raffaele* v. *Granger*, 3rd Cir. 1952, 196 F. 2d 620 and *Rothensies* v. *Ullman*, 3rd Cir., 1940, 110 F. 2d 590 held contrary, I decline to follow them."

The Court of Appeals for the Second Circuit affirmed in a per curiam opinion reading as follows:

> "Upon the opinion of Judge Cashin, D. C. S. D. N. Y., April 16, 1959 [172] F. Supp. [392], the order is affirmed."

---

[1] The Courts below assumed that Scanlon's actions effected a "detention" of "property" within the meaning of 28 U. S. C. § 2463. This is consistent with the decision of the Court of Appeals for the Ninth Circuit in *Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906 (1957). *Accord, Raffaele* v. *Granger*, 196 F. 2d 640 (3rd Cir. 1952); *United States* v. *Eiland*, 223 F. 2d 118 (4th Cir. 1955).

REASONS FOR GRANTING THE WRIT

1. There is a direct conflict between the decision below and decisions of the Court of Appeals for the Third Circuit.

The decision of the Court of Appeals conflicts directly with the decisions of the Third Circuit Court of Appeals in *Raffaele* v. *Granger*, *supra*, and *Rothensies* v. *Ullman*, *supra*. This conflict was expressly recognized by the District Judge in his opinion in the quotation reproduced above. As stated, the Court of Appeals affirmed "upon the opinion" of the District Court.

In both of the Third Circuit cases warrants of distraint improperly issued by federal tax officials were quashed in summary proceedings upon petition by the owner of the affected property. In both cases the Court of Appeals for the Third Circuit affirmed the district courts and, in *Raffaele*, stated that "* * * a plenary civil suit is not necessary to enable a court to exercise jurisdiction over property thus *in custodia legis*." *Raffaele* v. *Granger*, 196 F. 2d 620, 623 (3rd Cir. 1952). This statement and the holdings of the Court of Appeals for the Third Circuit clearly conflict with the decisions of the courts below in the instant case.[2]

[2]In addition conflict apparently exists among the district judges in the Southern District of New York in the construction of this Statute. In a similar case decided one week after the instant case (*Fine Fashions Inc.* v. *Moe*, 172 F. Supp. 547 (S. D. N. Y. 1959)) Bryan, *D. J.* stated at p. 551: "It may well be that it is within the discretion of the court to grant final relief on a summary petition when the seizure is totally without warrant of law." This statement contrasts directly with the statement by the District Court in the instant case that "* * * the District Court has no jurisdiction to determine the respective rights [to the property] * * * in a summary proceeding." 172 F. Supp. 392, 393. This last statement, apparently adopted by the Circuit Court in the instant case, also appears inconsistent with the statement by Dawson, *D. J.*, in *Winokur* v. *A'Hearn*, 172 F. Supp. 498, (S. D. N. Y. 1956), that summary proceedings might be proper in similar cases where no contested issues of fact exist.

2. A substantial and novel question of interpretation of a federal statute is involved.

In addition to this recognized conflict, there is a conflict between the Circuit Courts of Appeals for the Third and Fifth Circuits concerning the basis for affording a remedy to parties affected by improper seizures under the revenue laws. The Fifth Circuit Court of Appeals in *Holland v. Nix*, 214 Fed. 2d 317 (1954) has indicated that "equitable principles" would sustain a suit in a federal court to prevent an improper seizure of property by federal tax officials. In *Raffacle* and *Rothensies* the Third Circuit Court of Appeals held that § 2463 affords the basis for such a suit and that summary proceedings may be maintained to obtain the relief sought. The Second Circuit Court of Appeals held, in the instant case, that summary proceedings are not maintainable but has not yet decided whether such a suit must be based upon § 2463 or upon "equitable principles".

A decision by this Court in the instant case would not only resolve the conflict between the Second and Third Circuit Courts of Appeals whether summary proceedings may be maintained but would also resolve the question of whether § 2463 provides the basis for quashing federal tax levies against the property of a non-taxpayer. Thus uniformity in the interpretation of this federal statute would be implemented.

This question is plainly of substantial import. A party whose property has been improperly seized by a District Director to satisfy the tax liability of another should be able to obtain a determination of his claim quickly in a federal court. It would appear that Congress so intended since the property improperly detained was placed *in custodia legis*. The opinion of the Court below would put affected parties to the time consuming and expensive processes of a plenary suit at law, while similarly situated parties in other circuits are afforded a more expeditious method of

having their claims adjudicated. The tax laws affect nearly everyone in their application. Seizures of property to satisfy unpaid taxes are numerous. Seizures of the property of non-taxpayers to satisfy the tax liability of others are not rare and have been involved in several reported cases.

The only cases found in this area decided by this Court are *Ex Parte Fassett*, 142 U. S. 479 (1892) and *GoBart Co. v. United States*, 282 U. S. 344 (1933).

In *Fassett*, the question presented was whether a writ of prohibition should issue to a District Court to prevent the lower Court from further proceeding with a libel proceeding brought by the owner of a yacht against a federal tax official who allegedly had improperly seized the vessel for violation of the customs laws. The vessel concerned had been attached by a federal marshal under court order. This Court refused to issue the writ on the ground that the predecessor of § 2463 (containing the same provisions as the current § 2463) granted jurisdiction over the matter to the District Court and because the District Court had acquired jurisdiction over the vessel by the attachment.

In *GoBart*, certain documents had been seized by prohibition agents. The defendants in a criminal prosecution under the Prohibition Act moved for an order directing the United States to return these items and preventing their use as evidence in a criminal proceeding. The Circuit Court of Appeals for the Second Circuit considered the problem of the jurisdiction of the District Court to entertain a summary proceeding of the type there involved, and decided that since the prohibition agents were not officers

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See, e.g., Seattle Association of Credit Men v. U. S., 240 F. 2d 906 (9th Cir. 1957); Ursa, Inc. v. Dudley, 231 F. 2d 178 (3rd Cir. 1956); Lavino v. Jamison 230 F. 2d 909 (8th Cir. 1956); Holland v. Nix, *supra*; Raffaele v. Granger, *supra*; Stuart v. Chinese Chamber of Commerce, 168 F. 2d 709 (9th Cir. 1948); Rothensies v. Ullman, *supra*; Fine Fashion, Inc. v. Moe, *supra*; Winslow v. Whyte, *supra*; Brinker Supply Co. v. Dougherty, 134 F. Supp. 884 (D. C. Pa. 1955); Long v. Rasmussen, 281 Fed. 236 (D. C. Mont. 1922).

of the Court nor acting under Court process, summary proceedings against them would not lie. The Court noted that, 62 Stat. 974, 28 U. S. C. § 747, 1940 ed., (now 28 U. S. C. § 2463) prohibited replevin proceedings to obtain the relief sought, and stated that a bill in equity, rather than a summary proceeding, was the proper method of obtaining the return of the documents. This Court reversed the Circuit Court on the ground that under the applicable statutes the prohibition agents were, in effect, officers of the Court and thus subject to the disciplinary powers of the Court. Therefore, the District Court had jurisdiction summarily to order them to return property illegally seized by them.

Neither of the above cases presented the problem of interpreting § 2463 to allow summary proceedings to recover property improperly seized by one not an officer of the Court. The instant case is the first to present squarely this problem to this Court in the more common situation involving seizures of property by tax officials.

3. The decision of the Court below appears erroneous and the conflicting decisions of the Court of Appeals for the Third Circuit, correct.

Petitioner respectfully submits that the decisions of the Court of Appeals for the Third Circuit in the *Raffaele* and *Rothensies* cases, *supra*, are correct and that of the Court of Appeals for the Second Circuit in the instant case is erroneous. The meaning of the first portion of this one sentence statute is clear; replevin is forbidden as a remedy and the State Courts are deprived of jurisdiction in this area. The second portion of the sentence places the property "in the custody of the law and subject to the orders and decrees of the courts of the United States having jurisdiction thereof." By reference to 62 Stat. 932, 28 U. S. C. § 1340 which gives the District Courts jurisdiction over civil actions arising under any federal revenue laws, juris-

diction is vested in the District Court for the District where the property is located. [*Pennsylvania Turnpike Commission* v. *McGinnes, et al.*, Civil Action No. 12,796, 3rd Cir., June 8, 1959, *petition for cert. filed*, July 17, 1959 (October Term, 1958, No. 223).] *Raffaele* v. *Granger, supra.*

It seems evident that a Court having custody of specific property which is expressly made subject to its orders and decrees has the power and obligation to determine the disposition of the property. It is respectfully submitted that such a Court cannot decline jurisdiction even if it subsequently should decide, in the exercise of its discretion, that in the circumstances of a particular case the necessity for summary proceedings was not shown and, therefore, ordered the case to proceed pursuant to the Federal Rules of Civil Procedure.

The interpretation petitioner advances is consistent with the legislative history of the section. The statute was designed to overcome certain difficulties in tax collection by federal tax authorities which were caused by an "Ordinance of Nullification" passed by South Carolina in 1832. This ordinance subjected federal officers to fine and imprisonment for seizing property for non-payment of federal taxes and, according to Senator Wilkins of Pennsylvania "overthrew the whole [federal] revenue system." Gale & Seaton's Register of Debates in Congress, Vol. IX, Part I, p. 248. Senator Wilkins then went on to state that:

> "This section has two objects in view: first, it gives power to officers to sue in the federal courts; and second, it provides that they shall not be dispossessed of property seized by them under the laws of the Central Government, without the authority of the courts of the United States." [Gale & Seaton, p. 259]

The seized property was therefore placed in the custody of the Federal Courts so that the question of the propriety of the seizure could be promptly determined. To require a

plenary suit by a non-taxpayer to repossess his property illegally seized under the alleged authority of a revenue law might expose the innocent non-taxpayer to the frequently extensive delays encountered in a civil suit which proceeds pursuant to the Federal Rules of Civil Procedure.

It is therefore respectfully submitted that in order to give its plainly intended meaning to the second portion of § 2463 the decisions of the Third Circuit Court of Appeals in *Raffaele* and *Rothensies* holding that the propriety of the seizure may be decided in a summary proceeding should be held correct and that of the Second Circuit Court of Appeals in the instant case incorrect.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MYRON ENGELMAN
Counsel for petitioner

August 24, 1959

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No. 339

In the Supreme Court of the United States

OCTOBER TERM, 1959

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
PETITIONER

v.

THOMAS E. SCANLON, District Director of Internal Revenue, CITY OF NEW YORK and ACME CASSA, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DISTRICT DIRECTOR IN OPPOSITION

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CITATIONS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE DISTRICT DIRECTOR IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 14a-16a) is reported at 172 F. Supp. 392. The *per curiam* opinion of the Court of Appeals (R. 17a) is reported at 267 F. 2d 941.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1959. (R. 17a.) The petition for a writ

of certiorari was filed on August 22, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the courts below were correct in holding that a third party claiming a lien upon a taxpayer's property superior to the tax lien of the United States has a right to the determination of the conflicting claims in a plenary civil suit, but not by summary proceedings.

STATUTE INVOLVED

28 U. S. C.:

> SEC. 2463. *Property taken under revenue law not repleviable.*
>
> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

STATEMENT

The petitioner here is a surety company which furnished a performance bond on June 21, 1956, to the City of New York on behalf of the taxpayer-contractor, Acme Cassa. (R. 5a.) On March 4, 1959, the petitioner filed a petition in the United States District Court for the Southern District of New York for a summary determination of its claim to funds due the contractor in the hands of the City of New York as against tax liens of the United States. (R. 1a.) The petitioner's lien rests upon

the allegation that Acme Cassa, because of financial difficulties, became unable to complete the work required to be performed by it, and demand was made upon the petitioner, as surety, to complete the work and to pay various unpaid suppliers of labor and material for work and material supplied by them in connection with the prosecution of the work required to be performed. (R. 6a.) As of November 25, 1958, the petitioner alleged that in accordance with this demand it had paid to such suppliers of labor and material the sum of $82,990.17. (R. 7a.) Prior to that date and in the period from November 1, 1957, through May 21, 1958, the petition stated on information and belief that four separate notices of lien and levy for various federal taxes totalling $62,266.37, claimed to be due from Acme Cassa, were filed by the District Director of Internal Revenue in the appropriate office of the City of New York; and "various sums" had been paid on the levy leaving an unpaid balance due of "approximately $35,000" and the District Director had reduced the tax lien to that amount. (R. 6a-8a.) The petition further alleged that but for the notices of lien and levy the City treasurer is ready to pay over to the petitioner all funds due to the taxpayer from the City. (R. 7a-8a.) On these allegations, the petitioner prayed that the notices of levy be quashed or in the alternative that the amounts due to the United States be determined and the petitioner paid any excess in the hands of the City. (R. 8a-9a.)

On March 4, 1959, the date of the filing of this petition, the District Judge issued an order directing

service of the petition on or before March 25, 1959, and requiring the District Director to show cause on March 31, 1959, at Motion Term, why the relief prayed for should not be granted. (R. 2a-3a.) On April 16, 1959, the Government filed an affidavit in opposition to the petition to quash the notices of levy on the ground that no civil action had been instituted either by the United States or the petitioner with respect to their claims to the property. (R. 1a, 11a-12a.) On the same day, the District Court dismissed the summary proceedings to quash the notices of levy and remitted the petitioner to a plenary suit for an adjudication of the conflicting claims between it and the United States to the taxpayer's property. (R. 14a-16a.) The decision was affirmed in a *per curiam* opinion by the Court of Appeals. (R. 17a.)

ARGUMENT

The decision below is correct and no substantial question requiring review by this Court is presented. The question presented is a narrow one, *i.e.*, whether a person claiming a lien upon a taxpayer's property, superior to the tax lien of the United States, may compel the United States to adjudicate the validity of the liens in summary proceedings rather than in a plenary suit, in accordance with the Federal Rules of Civil Procedure, brought by either the claimant or the United States. The United States may bring suit in a Federal District Court to adjudicate the validity of its lien under Section 7402 of the Internal Revenue Code of 1954, and a person claiming a lien upon property superior to the tax lien may bring

suit in a state or federal court of competent jurisdiction to quiet his title or foreclose his lien under 28 U. S. C., Section 2410. *Seattle Assn. of Credit Men* v. *United States*, 240 F. 2d 906 (C. A. 9th); *United States* v. *Stock Yards Bank of Louisville*, 231 F. 2d 628 (C. A. 6th). There is no express statutory authority for summary proceedings and none can be implied from 28 U. S. C., Section 2463, *supra*, p. 2, which prohibits summary proceedings by way of a writ of replevin, and affords a jurisdictional basis for otherwise allowable suits. *Seattle Assn. of Credit Men* v. *United States*, *supra*. See *In re Fassett*, 142 U. S. 479. Whatever authority for summary relief may be provided by the general equity powers of a District Court (cf. *Holland* v. *Nix*, 214 F. 2d 317 (C. A. 5th)), there is no right to summary relief where relief in an orderly fashion by civil suit is available. *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (C.A. 2); *In re Behrens*, 39 F. 2d 561 (C.A. 2d); *Fine Fashions, Inc.* v. *Moe*, 172 F. Supp. 547 (S.D. N.Y.); *Winokur* v. *A'Hearn*, 172 F. Supp. 498 (S.D. N.Y.). The only justification offered by the petitioner in support of its claim to summary procedure, rather than an ordinary civil action, is that since the property is in the jurisdiction of the court, a claimant thereto should not be put to "time consuming and expensive processes of a plenary suit at law". (Pet. 6.) But if the taxpayer is correct in its contention that there are no genuine issues of fact in the case (cf. Pet. 3), it may secure prompt and inexpensive relief in an ordinary civil suit by a motion for summary judgment, which may be filed

twenty days after the service of its complaint. Federal Rules of Civil Procedure, Rule 56. There is no reason why the United States should be forced into a compulsory summary procedure, where there may well be issues of fact concerning the "details * * * of controlling importance" as to the time and circumstances out of which the respective liens arose. *In re Behrens*, *supra*, 39 F. 2d at 563.

The alleged conflict between the decisions of the Second Circuit (*In re Behrens*, *supra*; *Goldman* v. *American Dealers Service*, *supra*), and the Third Circuit (*Raffaele* v. *Granger*, 196 F. 2d 620; *Rothensies* v. *Ullman*, 110 F. 2d 590) is more formal than real. No urgent questions of jurisdiction are in fact involved here since the decision below is placed not only on jurisdictional grounds, but also on the ground that a suit for summary relief "does not lie" (R. 15a) where relief by plenary suit is readily available (R. 15a).[1] Moreover, both *Ullman* and *Raffaele* involved a claim that a petitioner's property was being taken to pay the taxes of another, and not, as here, asserted liens upon a taxpayer's property held by a stakeholder. In any event, the petitioner is not substantially affected by the decision below, since it may, without prejudice to its claimed right to the property involved, easily comply with it.

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[1] Hence, there is no real intra-circuit conflict as claimed

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1959.

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
Petitioner,

vs.

SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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CASES CITED

Opinions Below

The opinion of the Court of Appeals (R. 17) is reported at 267 F. 2d 941. The opinion of the District Court (R. 14) is reported at 172 F. Supp. 392.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1959 (R. 17). The petition for certiorari was filed on August 22, 1959 and was granted on November 9, 1959. The jurisdiction of this Court is invoked and rests on 28 U. S. C. § 1254(1).

Question Presented

> Do the United States District Courts have jurisdiction under 28 U. S. C. § 2463 to determine, in a summary proceeding instituted by order to show cause and petition, the rights to property improperly detained under the alleged authority of the revenue laws.

The statute involved is 28 U. S. C. § 2463, which provides:

> "§ 2463. Property taken under revenue law not repleviable.
>
> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof."

Statement of the Case

The petition (R. 4-9) alleges that a construction contract was entered into between Acme Cassa, Inc., a contractor, and the City of New York. A condition to the making of the contract was the furnishing of performance and payment surety bonds by the contractor. The petitioner, New Hampshire Fire Insurance Company, as surety, executed these bonds, on behalf of Acme Cassa, Inc., as principal, in favor of the City of New York, as obligee.

After commencement of performance of the contract, Acme Cassa, Inc. became financially unable to continue performance or to pay its subcontractors and suppliers of labor and material. Petitioner, as surety, financed completion of the contract and made payments to unpaid subcontractors, laborers and suppliers. As of November 25, 1958 these payments totalled $82,990.17.

Since January 7, 1958, the City of New York has had available for delivery to petitioner a warrant in the amount of $68,015.50. Another warrant for the final contract payment in the amount of $35,936.80 will be issued by the City of New York in the future.* The available warrant has not been delivered to petitioner because of certain notices of lien and notices of levy served upon the City of New York by Respondent Scanlon, District Director of Internal Revenue. These notices of liens and levies arise out of unpaid taxes, totalling $39,004.67 as of January 21, 1959, claimed to be due from the contractor, Acme Cassa, Inc. Respondent Scanlon consented to the payment to the surety of $28,515.50 from the $68,015.50 warrant.

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*$36,132.93 was issued and delivered to petitioner with consent of Respondent on October 7, 1959, after the filing of the petition.

In its petition to the District Court the petitioner herein claimed (1) that under the law of the State of New York, it is subrogated to the rights of the City of New York, its obligee, to the unpaid contract balance and that, as subrogee, it is entitled to the contract balance in question against any claims of the Government based on unpaid taxes of its principal; and (2) that 28 U. S. C. § 2463 places its property which has been improperly detained by the District Director of Internal Revenue "in the custody of the law" and that the District Court must render an appropriate order or decree relating to the disposition of the property.

Upon the petition the District Court issued an order directing respondents Scanlon, the City of New York and Acme Cassa, Inc. to show cause why the above mentioned notices of levy should not be quashed (R. 2). Only Respondent Scanlon appeared in opposition to the petition.

The District Court, relying upon *In re Behrens*, 39 F. 2d 561 (2d Cir. 1930) and *Goldman v. American Dealer's Service*, 135 F. 2d 398 (2d Cir. 1943), dismissed the petition, holding that the District Court had no jurisdiction in a summary proceeding to adjudicate rights to the property even though the property was placed by statute in the custody of the law. The applicability of Section 2463 was not in question, the District Court saying: "*** I will assume that the funds have been detained within the meaning of Section 2463 (cf. *Seattle Association of Credit Men v. U. S.* (9 Cir. 1957) 240 F. 2d 906)".

The Court of Appeals for the Second Circuit affirmed, in a per curiam opinion reading as follows:

> "Upon the opinion of Judge Cashin, D. C. S. D. N. Y., April 16, 1959 [172] F. Supp. [392], the order is affirmed."

ARGUMENT

The United States District Courts Have Jurisdiction under 28 U. S. C. § 2463 to Determine in a Summary Proceeding the Rights to Property Improperly Detained under the Alleged Authority of the Revenue Laws.

The sole question presented to this Court is whether a party, whose property has been improperly detained under the purported authority of the revenue laws of the United States to satisfy the tax liability of another, may have his claim to the property adjudicated in a summary proceeding.

Petitioner does not complain of action by the United States, but of action by Respondent Scanlon in his personal capacity. In short, petitioner alleges that it is not a delinquent taxpayer and that Scanlon plainly is acting outside the scope of his authority in seizing petitioner's property to satisfy the tax liability of another; that the seizure, therefore, constitutes a trespass which, in the absence of Section 2463, could be speedily redressed in a state court; and that Section 2463, while ousting the state courts of jurisdiction, places the seized property "in the custody of the law" so that the Federal court may summarily remedy the wrong inflicted upon the injured petitioner.*

The differences between summary proceedings and plenary suits have been set forth in *Central Republic Bank and Trust Co. v. Caldwell*, 58 F. 2d 721, 731-32 (8th Cir. 1932):

> "The main characteristic differences between a summary proceeding and a plenary suit are: The former is based upon petition, and proceeds without formal pleadings; the latter proceeds upon formal pleadings. In the former, the necessary parties are cited in by

*The interesting history of Section 2463, first enacted in 1833 to meet the problems created by South Carolina's Ordinance of Nullification appears in IX Gale & Seaton, Register of Debates in Congress 244 *et seq.* (1833).

> order to show cause; in the latter, formal summons brings in the parties other than the plaintiff. In the former, short time notice of hearing is fixed by the court; in the latter, time for pleading and hearing is fixed by statute or by rule of court. In the former, the hearing is quite generally upon affidavits; in the latter, examination of witnesses is the usual method. In the former, the hearing is sometimes ex parte; in the latter, a full hearing is had.
>
> It is apparent that the differences are largely procedural rather than substantive."

Due process, of course, must be satisfied by proper notice to the parties with opportunity to answer and be heard. Petitioner does not contend that Scanlon should not be afforded an opportunity to dispute petitioner's claim on the facts and the law.

That Respondent Scanlon's actions in serving the notices of liens and levies constituted a detention within the meaning of 28 U. S. C. § 2463 is not open to serious question. It was "assumed" by the District Court (R. 15) and Scanlon did not contend to the contrary.*, In addition to *Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906 (9th Cir. 1957), cited in the District Court's opinion, the Third and Fourth Circuits appear to be in accord that the service of a notice of levy effects a "detention" within the meaning of Section 2463. *Raffaele* v. *Granger*, 196 F. 2d 620 (3d Cir. 1952); *United States* v. *Eiland*, 223 F. 2d 118 (4th Cir. 1955).

*Similarly the allegations of the petition concerning New Hampshire's claim that it is subrogated to the rights of the City have not been questioned. Under New York law, it is clear that a completing surety which pays laborers and material men to complete a contract is entitled, as subrogee, to any unpaid contract balance as against any claims of the government based on unpaid taxes of the principal. *Massachusetts Bonding & Insurance Company* v. *N. Y.*, 259 F. 2d 33 (2d Cir. 1958); *Fidelity & Deposit Company* v. *N. Y. City Housing Authority*, 241 F. 2d 142 (2d Cir. 1957); *Aetna Casualty Co.* v. *U. S.*, 4 N. Y. 2d 639 (1958); *Fidelity & Guaranty Company* v. *Triborough Bridge Authority*, 297 N. Y. 31 (1957).

CASES IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

The problem presented to this Court arose before the Court of Appeals for the Third Circuit in *Raffaele v. Granger*, 196 F. 2d 620 (1952). In that case a levy was made on bank accounts standing in the name of a delinquent taxpayer and his innocent wife. A petition by the spouses praying that the warrants of distraint be quashed was granted. The petition was based on the Pennsylvania law which made the interests of the spouses in the accounts inseparable so that the effect of the Collector's action was to take the property of the wife to satisfy the liability of the husband.

The Court of Appeals, after pointing out that the United States has no power to take property from one person to satisfy the tax liability of another, rejected the Collector's contention that a plenary action was needed.

The Court stated at page 623:

> "Distraint is a summary, extra judicial remedy having its origin in the Common Law. There, a form of self help, it consisted of seizure and holding of personal property by individual action without intervention of legal process for the purpose of compelling payment of debt. Relief of one aggrieved by the levy of distraint, at common law, was by an action of replevin against the distrainor. Pollock & Maitland, History of the English Law, Vol. II, page 577. In our time, distraint, together with a power of sale, has been made available to the Collector of Internal Revenue as a sanction for securing payment of taxes which persons liable have refused or neglected to pay. But property taken or detained under any revenue law, unlike property seized at common law, is not repleviable. By Section 2463 of Title 28 of the United States Code, however, it is 'deemed to be in the custody of the law' and is subject to the 'orders

> and decrees of the courts of the United States having jurisdiction thereof.' * * * Moreover, a plenary civil suit is not necessary to enable a court to exercise jurisdiction over property thus *in custodia legis*. * * * Once due process has been satisfied by notice to the interest parties and opportunity to be heard, the court may proceed summarily to adjudicate the rightfulness of seizure. Cf. In re Behrens supra, Gilliam v. Parker, supra."

In addition to *Raffaele*, the Court of Appeals for the Third Circuit, in two other cases, has relied on Section 2463 as a basis for granting summary relief to one whose property has been seized to pay the taxes of another. *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178, 180 (1956) and *Rothensies* v. *Ullman*, 110 F. 2d 590 (1940).

CASES IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The district court's opinion in the instant case, which was adopted by the Court of Appeals, based its decision that the court was without summary jurisdiction on two Second Circuit cases: *In Re Behrens*, 39 F. 2d 561 (2d Cir. 1930) and *Goldman* v. *American Dealer's Service*, 135 F. 2d 398 (2d Cir. 1943). We submit that both of these cases confirm and do not deny the summary jurisdiction of the District Court. Each case acknowledges the summary jurisdiction and deals only with the discretion exercised by the District Court in a pending summary proceeding.

In *United States* v. *Green*, 40 F. 2d 593 (2d Cir. 1930), the Second Circuit Court of Appeals defined its holding in the *Behrens* case as follows:

> "In Matter of Behrens, supra, we held that, when forfeitable property is seized and held by prohibition officers, the legality of their seizure was to

> be determined in the forfeiture proceedings, not on summary motion for an order directing return of the property." (page 598)

In *Behrens*, however, the Court of Appeals, considering the applicability of Section 2463, concluded "* * * that the District Court has jurisdiction to direct the officer who detains the seized property as to its disposition" (page 563). The Court then held that "* * * the owner's proper and orderly procedure is to determine this question upon proceedings for forfeiture" (page 563). Finally, the Court said at page 564:

> "Our conclusion is that, upon the appellant's petition, the court should not have passed upon the legality of the seizure, but should have directed the prohibition administrator, assuming he was served with the show cause order or voluntarily appeared, either to institute proceedings promptly (and we should suppose ten days would be sufficient time) or to abandon the seizure and return the property."

It is evident, we believe, that in *Behrens*, the Court of Appeals assumed the existence of the power of the District Court to exercise summary jurisdiction over the seized property but held that in the interest of "proper and orderly procedure", the order that should have been made by the District Court, pursuant to the provisions of Section 2463, was to direct the forfeiture proceedings to be instituted in ten days or to require the return of the property. Such an order involved the discretion of the District Court, not its power, for obviously, in order to direct the return of the seized property, even in the alternative (if a forfeiture proceeding were not instituted), the District Court needed to have the power to make such an order in the summary proceeding pending before it.

Similarly in *Goldman*, the District Court in a summary proceeding directed the return of the seized property

"* * * unless within ten days from the service of this order * * * forfeiture proceedings or other proceedings to test the validity of the seizure are commenced, in which event the motion is denied". (page 399). The Court of Appeals affirmed, saying:

> "Consequently, for purposes of construing the statute, we are required to assume that appellants, government officials, without a shadow of lawful authority, have seized a citizen's property. Officials, when they thus behave, are stripped of their official character; what they do is the mere wrong and trespass of those individual persons who falsely speak and act in the name of the government; an official, who has acted in that manner, 'ceased to be an officer of the law, and became a private wrong-doer'; 'though professing to act as officers,' appellants were, on the assumed facts now before us, 'individual trespassers guilty of a wrong in taking the property' of appellee 'illegally'." (page 400)
>
> * * * * *
>
> "We therefore interpret 39 U. S. C. A. § 498, taken together with 28 U. S. C. A. § 747, [§ 2463] as meaning that the seized property may be held for two months after termination of proceedings begun by the government; that such proceedings must be brought not later than six months after the seizure; but that, under 28 U. S. C. A. § 747, [§ 2463] the court may direct that the property be returned unless the government brings such proceedings with reasonable promptness short of the full six months; what is reasonable promptness will, of course, depend on the particular facts; there might be situations in which a delay for six months would be reasonable; that would be particularly true where the citizen admitted (what appellee does not admit) that the property had been lawfully taken. Under the statutes thus interpreted, the order of the trial judge was proper. Appellants made not the slightest showing and in fact did not suggest that any injury

> or inconvenience would result to the government from instituting a prosecution six weeks and more after the seizure; on the other hand, the retention of the checks might impair or even destroy appellees' business, and the possible loss of the cash discounts appeared not unlikely to cause serious loss. Accordingly, the trial court did not abuse its discretion. In re Behrens, 2 Cir., 39 F. 2d 561. How much showing citizens must make in every such case we need not here decide; but when the court is required, as here, to assume illegality in the seizure, it would seem that too much of a burden should not be put on the citizen." (page 401-2)

In summary, we have been unable to find any case either in the Second Circuit or any other Circuit which has not recognized the summary jurisdiction of the District Court where Section 2463 was applicable and the property was in the custody of the law. Our contention is merely that the District Court must recognize its summary jurisdiction and cannot dismiss for lack of jurisdiction. The manner in which it exercises its jurisdiction with respect to the merits of a particular case, is, of course, another matter and not involved in the question here presented.

Finally, it may be noted that it has been uniformly held that a court has summary jurisdiction over property in its custody. *GoBart Importing Co.* v. *United States*, 282 U. S. 344 (1931) (Improperly seized evidence); *Krippendorf* v. *Hyde*, 110 U. S. 276 (1884) (Improperly attached property); *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426 (1924) (Property of a bankrupt).

CONCLUSION

Petitioner's petition asserts that its property has been improperly detained under the purported authority of a revenue law of the United States. Under 28 U. S. C. § 2463

property so detained is placed in the custody of the law and made subject to the District Court's orders and decrees. The District Court has thus been invested with the authority to deal with such improperly seized or detained property in a summary proceeding. The order appealed from should be reversed and this matter remanded to the District Court so that appropriate proceedings may be held and petitioner's claim adjudicated.

Respectfully submitted.

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No. 339

In the Supreme Court of the United States

OCTOBER TERM, 1959

NEW HAMPSHIRE FIRE INSURANCE COMPANY,
PETITIONER

v.

THOMAS E. SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (R. 17–18) is reported at 267 F. 2d 941. The opinion of the district court (R. 14–16) is reported at 172 F. Supp. 392.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1959 (R. 19). The petition for a writ of certiorari was filed on August 22, 1959, and granted on November 9, 1959 (R. 20). 361 U.S. 881. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 2463 authorizes a proceeding to quash a notice of levy for federal taxes, allegedly on property not belonging to the taxpayer, to be brought by a summary motion procedure rather than by an ordinary civil action governed by the Federal Rules of Civil Procedure.

STATUTES AND RULES INVOLVED

28 U.S.C. 2463; the Act of March 2, 1833, 4 Stat. 632; §§ 6331 and 6332 of the Internal Revenue Code of 1954 (26 U.S.C.); and Rules 1–3 of the Federal Rules of Civil Procedure are set forth in part in the Appendix, *infra*, pp. 36–40.

STATEMENT

On March 4, 1959, petitioner filed in the United States District Court for the Southern District of New York a motion[1] to quash certain notices of levy that had been served by respondent Scanlon, the District Director of Internal Revenue, upon the City of New York. The motion alleged the following (R. 4–9): Petitioner was the surety on performance and payment bonds furnished to the City of New York covering certain construction work being performed for the City by the taxpayer, Acme Cassa, Inc. After partial performance, Acme Cassa defaulted, and peti-

[1] Petitioner styled the application a "petition," and similar applications are variously referred to in the cases, without distinction, as either "motions" or "petitions." Since "motion" is the more descriptive term and is the nomenclature used in the Federal Rules (see F.R. Crim. P. 41(e) (motion for return of illegally seized property); F.R. Civ. P. 7(b)), that term will be used in this brief.

tioner, under the obligations of its bonds, paid off the suppliers and completed the work, expending for both purposes a total of $82,990.17 as of November 25, 1958. At various times between November 1, 1957, and May 21, 1958, respondent Scanlon had filed with the City, against amounts due on the construction contract, notices of lien and notices of levy for taxes due from Acme Cassa, of which the amount remaining unpaid was approximately $35,000. Because of the notices of levy, the City had refused to deliver to petitioner a warrant, already prepared as a partial payment on the contract, in the amount of $68,015.50[2] and will refuse to deliver a warrant for the final payment on the contract of $35,936.80. Petitioner alleged that as a completing surety, or by virtue of an assignment executed by Acme Cassa, it was entitled to receive the $68,015.50 warrant then available "free of the claim of the liens asserted" by respondent Scanlon. The motion joined the City and Acme Cassa as respondents and prayed that the notices of levy be quashed insofar as they restrained the payment to petitioner of the $68,015.50 warrant or, in the alternative, insofar as they restrained the payment of any sums in excess of the amount due respondent Scanlon from Acme Cassa.[4]

[2] Respondent Scanlon had, before the motion was filed, consented to the payment of $28,515.50 of that warrant (R. 8-9), so the amount being withheld under that warrant was actually only $39,500.

[3] The motion alleged that $15,021 due a different surety on another contract of Acme Cassa's was also being withheld under a notice of levy (¶19, R. 8), but that levy is not involved here.

[4] By stipulation of the parties filed in the district court on December 30, 1959, all amounts due by the City were released

Upon the motion being filed, an order to show cause was issued by the district court, to be served on or before March 25, 1959, directing respondents to show cause at a motion term of the court on March 31, 1959, why an order should not be entered quashing the notices of levy (R. 2–3). On April 16, 1959, the United States Attorney, on behalf of respondent Scanlon, filed an affidavit in opposition to the motion, stating that no summons and complaint in a civil action had ever been served (R. 11–12). On the same date, the district court dismissed the motion on the ground that there was no authority for the summary motion proceedings sought to be instituted and that petitioner must proceed instead by a plenary civil action (R. 14–16). The court of appeals affirmed the order in a *per curiam* opinion (R. 17–18).

SUMMARY OF ARGUMENT

1. The sole issue in this case is the narrow procedural one whether, assuming that petitioner can maintain an action against the district director to quash the levy, it can do so by a summary motion procedure rather than by an ordinary civil action. The significance of the question is whether the proceedings are to be governed by the Federal Rules of

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for payment to petitioner upon petitioner's agreement to deposit in the registry of the district court $31,000 in United States Treasury bonds (the amount of Acme Cassa's tax liability having by then been reduced to approximately $22,000), to be held pending the decision of this Court and any subsequent proceedings. The stipulation was without prejudice to the rights of the parties, which were to be determined in accordance with the rights under the original notices of levy.

Civil Procedure or by procedures adopted for the occasion by *ad hoc* orders of the court.

Petitioner claims that summary proceedings have been authorized here by 28 U.S.C. 2463, which provides that property seized under the internal revenue laws "shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof." Petitioner contends that that provision places the property in the custody of the courts and that the courts have summary powers over property in their custody. That contention is supported neither by the history of § 2463, its text, the traditional bases for the exercise of summary powers, nor the provisions and policy of the Federal Rules.

2. Section 2463 originated as part of § 2 of the Act of March 2, 1833. Prompted by the South Carolina "Ordinance of Nullification," which had authorized replevy of property seized by federal customs officials, that Act contained extensive provisions forbidding state interference with revenue collections and creating exclusive federal jurisdiction over the subject matter. The text of the Act as a whole and the occasion for its passage show that those were its only purposes and there was no intent to modify the procedure in the federal courts or to substitute summary proceedings for the plenary proceedings theretofore required.

3. The "custody of the law" provision upon which petitioner primarily relies does not, as petitioner assumes, give to the courts "custody" of the property. The phrase is a term of art meaning neither more nor

less than that the property is not subject to attachment or other process. The provision simply gave to property seized by administrative process or powers the same protection against interference by other agencies that the common law had given to property seized under judicial process—subject of course to the powers reserved to the federal courts by the last clause of § 2463. It did not change the actual "custody" of the property or purport to define the powers of the federal courts with respect to it.

That meaning of the "custody of the law" provision is supported by other provisions of the 1833 Act which clearly show that it was the collector's custody that was to be protected against state interference, not some fictional custody in the federal courts. That is also the meaning of the phrase that seems expressly to have been accepted by this Court in *In re Fassett*, 142 U.S. 479.

4. Even if the provision be read as giving the courts some kind of "custody" of levied property, there would still be no authority for summary proceedings. The asserted general principle that a court may deal summarily with property *in custodia legis* obviously cannot be supported, for, since attached property is the very prototype of property *in custodia legis*, that would mean that any action *in rem* or *quasi in rem* could be by summary proceedings.

Nor is there any lesser ground on which summary proceedings can be supported. Summary powers to adjudicate the lawfulness of a property seizure have been exercised only where the property is in the custody of an officer of the court who is deemed to be

subject to the summary disciplinary powers of the court; where the proceeding is ancillary to a pending plenary action; or where the property was seized under an abuse of the court's own process. Clearly none of those bases is available here.

Summary powers of a different sort have been exercised in circumstances where the government, after a seizure, delays in bringing a forfeiture proceeding which a statute requires to be brought and makes the exclusive procedure for determination of the lawfulness of the seizure. To prevent the owner from being left remediless against the government's delay, it was early held that the court in which the forfeiture proceeding is required to be brought has power, on motion of the owner, to direct the government to institute the forfeiture proceeding promptly or else abandon the seizure. Although some courts have relied in part on § 2463 in support of that power, it is evident from the origin of the rule in a pre-§ 2463 dictum of Chief Justice Marshall that it rests instead on the general equitable powers of the court. In such cases, indeed, the motion proceeding can be viewed as being but a preliminary step in the plenary action sought to be precipitated and not an independent proceeding at all. In any event, those cases are of no aid to petitioner, which seeks by the summary proceedings to displace, not to precipitate, plenary proceedings.

5. Finally, whether or not the Federal Rules literally require that every proceeding not expressly excepted from their coverage be brought as a "civil action" governed by the Rules, the policy to provide

a uniform system of procedure in the federal courts requires at the least that no implied exceptions to the Rules be recognized without a persuasive demonstration of the necessity for departing from them. The summary judgment procedures provided by Rule 56 would seem to answer whatever legitimate claim petitioner may have for expedition, and no other reason for adopting the extraordinary summary procedure invoked here has been suggested.

ARGUMENT

I. INTRODUCTION

1. Petitioner, claiming that the director had levied upon property belonging to it rather than the taxpayer—or at least to which it claimed a right superior to the government's—brought this proceeding to have the respective rights to the property finally adjudicated and the notice of levy quashed as to any part of the property determined to belong to it. The proceeding was instituted, not by a complaint in a civil action, but by a motion and an order to show cause why the levy should not be quashed. There was then pending in the district court no other proceeding to which the motion was ancillary, the notice of levy having been administratively issued and requiring no judicial process or proceedings for its execution. The sole question presented is whether such a summary motion procedure is available, as an independent proceeding, to test the validity of the levy or whether, as

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[1] The statutes authorizing the levy procedure (§§ 6331 and 6332 of the Internal Revenue Code of 1954) are set forth in part in the Appendix, *infra*, p. 39.

the courts below held, the claimant must proceed by commencing a plenary civil action in accordance with the Federal Rules of Civil Procedure. The narrow question before this Court is solely a procedural one, the courts below having held, not that petitioner could not maintain a proceeding against the director to quash the levy but only that it must in any event do so by a plenary civil action rather than by motion. Hence, for purposes of this review, we will assume that a plenary civil action seeking the same relief could have been maintained.[6]

The significance of the question lies primarily in whether the steps in the proceeding are to be governed by the Federal Rules or by *ad hoc* orders of the court. The differences are evident even in the abortive proceedings already had in this case. While

[6] There are latent in the case other jurisdictional problems that would be presented even if the proceeding had been brought as a plenary civil action—*e.g.*, whether the suit is one against the United States and, if so, whether it has consented (see 28 U.S.C. 2410, consenting to suits to foreclose a lien on, or quiet title to, property on which the United States asserts a lien); whether the suit is one to restrain collection of a tax (see § 7421, Internal Revenue Code of 1954 (26 U.S.C. 7421)); and whether there is federal jurisdiction (see 28 U.S.C. 1340 (civil actions "arising under" the internal revenue laws)). The government's initial objection to the form of the service (R. 11-12) having been sustained by the district court, no other responsive pleading was filed and no other defenses raised. Accordingly, those questions were neither presented to nor decided by the courts below and are not presented here. And since those defenses, if any, would apply equally to a plenary or a summary proceeding, they have no bearing on the question presented here—*i.e.*, whether, even assuming that petitioner can maintain an action against the director to quash the levy, it can do so in a summary, rather than a plenary, proceeding.

the Federal Rules, recognizing the special time problems of inter-agency governmental action, allow the government 60 days, instead of the usual 20, in which to answer a complaint (Rule 12(a)), the order to show cause directed that return be made within 6 days. And, while the court in fact directed that service of the motion be made in the manner prescribed by the Federal Rules, presumably, under petitioner's theory, it was not required to do so and could have directed another manner of service. The form and content of the government's opposition to the motion were likewise not governed by the Rules, and such questions as the mode, time, and order of raising defenses were left indeterminate. Even more substantial differences might appear at the later stages of such a proceeding, such as the availability of the discovery procedures provided by the Rules and the nature of the hearing or trial to be had to resolve disputed issues of fact. The substantial question, in short, is whether the respective claims of petitioner and the government to the property are to be adjudicated according to the regular course of judicial procedure, governed by the Federal Rules, or in a summary motion proceeding governed by procedures improvised for the occasion by order of the court.

2. Although the statement of then District Judge Learned Hand that "It is clear that the owner of property unlawfully seized has without statute no summary remedy for a return of his property" (*United States* v. *Casino*, 286 Fed. 976, 978 (S.D.N.Y.)) must be qualified by certain recognized exceptions—as indeed it was later qualified by a panel of the Second Circuit which

included Judge Hand (*In re Behrens*, 39 F. 2d 561, 562) (see *infra*, pp. 24–28)—it remains valid as the general principle with which the inquiry must begin. That is, the fact that property has been wrongfully seized or detained by a government official does not by itself give the owner a right to seek its return by a summary proceeding. Like other suitors he must normally proceed by the ordinary course of judicial procedure to right the alleged wrong, and he may invoke extraordinary summary procedures only if a statute gives him that right or if there is some traditionally recognized basis for the exercise of summary powers. Cf. *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U.S. 426, 430–431.

Petitioner does not dispute that general principle but claims that summary proceedings in a case such as this are authorized by 28 U.S.C. 2463. That section, derived from § 2 of the Act of March 2, 1833, 4 Stat. 632, 633, and formerly codified as Rev. Stat. § 934, 28 U.S.C. (1940 ed.) 747, provides:

> All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

Petitioner contends, in substance, that by deeming property so detained to be "in the custody of the law," the statute gave the courts "custody" of the property and thereby invoked the allegedly established rule "that a court has summary jurisdiction over property in its custody." (Br. 10).

It may be noted at the outset that the implication petitioner finds in § 2463, if it be there, was overlooked for well over a century. The provision was originally enacted, in substantially its present form, in 1833, but it was not until 1952 that the Third Circuit expressly found in it authority to determine the rights to the property in a summary proceeding. *Raffaele* v. *Granger*, 196 F. 2d 620.[7] And to date no other court has found that meaning in the statute. While not conclusive that the provision will not bear the construction petitioner seeks to give to it, more than a century of silence is at the least persuasive evidence that no such result was intended.

We need not rely, however, on the lateness of petitioner's claim to defeat it, for, as we shall show: (1) the text of the 1833 Act as a whole and the circumstances of its passage make clear that the Act was concerned only with preventing state interference with tax collections and expanding federal jurisdiction, and not with regulating procedure in the federal courts; (2) that the phrase "in the custody of the law" means only that the property is immune from process and not, as petitioner assumes, that the courts have custody; (3) that even if the courts were given "custody" in some sense there is no general principle authorizing summary proceedings to adjudicate rights to property in the court's custody; and (4) that the policy underlying the Federal Rules re-

[7] The same court had, a dozen years earlier, upheld what appears to have been a similar proceeding, but without discussion of the procedural question. *Rothensies* v. *Ullman*, 110 F. 2d 590.

quires, at the very least, that departures from the procedures they prescribe be permitted only upon a clear showing of their inappropriateness, which has not been made here.

II. THE ACT OF MARCH 2, 1833, OF WHICH SECTION 2463 WAS A PART, REFLECTS NO PURPOSE TO AUTHORIZE SUMMARY PROCEEDINGS

The Act of March 2, 1833 (the original text of which is set forth in part in the Appendix, *infra*, pp. 36–38), of which the forerunner of § 2463 was a part (§ 2), was the Federal Government's answer to the "Ordinance of Nullification" adopted by South Carolina in an attempt to prevent collection of customs duties in that state.* The state ordinance had, among other things, provided for writs of replevin to reseize property distrained for duties and imposed severe criminal penalties on federal officers resisting such writs. The Act of March 2, 1833, in response, contained comprehensive provisions to overcome the state's resistance, including, in addition to what is now § 2463, provisions authorizing the collector to detain incoming vessels until the duties on their cargoes were paid (§ 1); making it unlawful for anyone to take such a vessel from the custody of the customs officers other than by process of a federal court (§ 1); temporarily (§ 8) authorizing the President to use federal troops to aid and protect customs officers in retaining custody of vessels (§ 1) or to overcome

* The history of the Act can be found in IX Gale & Seaton, *Register of Debates in Congress*, Part I, pp. 244 *et seq.* (1833).

forcible obstruction of the execution of federal laws or the process of federal courts (§ 5); extending federal jurisdiction to all cases arising under the revenue laws (§ 2); creating a federal cause of action for damages for injuries to revenue officers in the course of their duties (§ 2); making it a federal crime to dispossess or rescue property detained under the revenue laws (§ 2); and providing for the removal to the federal courts of any proceedings against revenue officers for acts done or rights claimed under the revenue laws (§ 3).

All of the provisions of the Act, it will be seen, were of a single piece: a comprehensive scheme to prevent state process or state force from interfering with customs collections and to center in the federal courts all litigation under the revenue laws. With the possible exception of the withdrawal of the remedy of replevin even in the federal courts, the Act was concerned only with the exclusion of the state courts and the expansion of the jurisdiction of the federal courts in revenue matters, and not with the regulation of procedure in the federal courts. And in the one case in which procedure was dealt with (the availability of replevin), the Act restricted, not expanded, the procedures available to aggrieved persons.[9] Thus

[9] In the light of the occasion which prompted the Act, there is obviously no basis for inferring that, in withdrawing the remedy of replevin, Congress must have intended to substitute some equally expeditious alternative proceeding. The Congress was not in a compromising mood; it simply withdrew in toto a particular form of remedy that had been used by the states to frustrate revenue collections. Replevin, moreover, did not afford a summary adjudication of the rights to the

to read the Act as broadly authorizing summary proceedings in lieu of the plenary suits theretofore required to challenge distraints is to find in the Act an unexpressed secondary purpose quite unrelated to—and, indeed, at odds with—the primary purpose evident in the express provisions.

III. SECTION 2463 DOES NOT GIVE THE COURTS CUSTODY OF PROPERTY DETAINED UNDER THE INTERNAL REVENUE LAWS

Turning to the interpretation of § 2463 itself, the question can readily be narrowed to that of the meaning of the "custody of the law" clause. The meaning of the anti-replevin clause is plain enough, as is at least the primary purpose of the clause making the property "subject only to the orders and decrees of the courts of the United States having jurisdiction thereof"—namely, to make the jurisdiction of the federal courts *exclusive* in such cases. It may be, as some courts have apparently held (*e.g., Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906 (C.A. 9)), that the clause can also be read as an affirmative *grant* of federal jurisdiction independent of the general provision, also contained in § 2 of the 1833 Act (and now codified in 28 U.S.C. 1340), extending federal jurisdiction "to all cases * * * arising under the revenue laws." That question, however, is of no concern here, since a grant of jurisdiction in that sense in no way implies that the jurisdiction may be invoked by summary rather than plenary procedures,

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property: it permitted the plaintiff summarily to recover possession of the property, but the final disposition of the dispute was by plenary proceedings.

and we do not understand petitioner to contend otherwise.

It is on the "custody of the law" clause, therefore, that petitioner must, and does, rest its argument. Petitioner contends that that clause gives the courts summary powers over the property under an asserted rule "that a court has summary jurisdiction over property in its custody" (Br. 10; but see pp. 23–32, *infra*). The argument rests on the unstated premise that "custody of the law" means the same thing as "custody of the court." Our purpose in this Point is to show that that premise cannot be supported and that, in fact, "custody of the law" means something quite different from that.

1. The primary significance in the common law of the phrase "in the custody of the law" lies in the established doctrine that property "in the custody of the law" (or, *in custodia legis*) is not subject to process—for example, property that has been attached by one court is said to be "in the custody of the law" and hence not subject to attachment by another until released by the first. *E.g., Hagen* v. *Lucas,* 10 Pet. 400; *Taylor et al.* v. *Carryl,* 20 How. 583; *Freeman* v. *Howe et al.,* 24 How. 450. When the phrase is used in that sense, it connotes nothing more than the immunity of the property from process. That is, the only legal relationship it defines is the disability of other jurisdictions to reach the property by process, and not the powers, or even the identity, of the "custodian."

From that usage it is clear that the statement that property seized under the revenue laws "shall be deemed to be in the custody of the law" does not

necessarily mean anything more than that it shall be immune from process, and there is no reason to construe it as affecting the actual and legal custody of the revenue officials who seized it. In our view, the "custody of the law" provision simply gave to property seized under administrative process or powers the same protections against interference by others that the common law had given to property seized under judicial process—by the simple device of saying that it too shall be deemed to be "in the custody of the law." In short, far from conferring custody on the courts, the very purpose of the provisison was to protect the collector's custody. Since, however, the last clause of the section expressly reserved the power of the federal courts, the net effect was to protect property seized by revenue officials from state process. Protection of customs officials from dispossession by state process having been, as we have seen, the very need that prompted the 1833 Act, there is no basis for rejecting that simple and direct interpretation of the "custody of the law" provision.[10]

[10] See also Senator Wilkins' explanation of the effect of the sentence of § 2 of the 1833 bill that is now § 2463 (IX Gale & Seaton; *Register of Debates in Congress*, Part I, p. 259 (1833)):

> * * * It declares that property taken under the authority of the laws of the United States shall be irreplevi-able, and only subject to the order and decrees of the courts of the United States * * *. This section has two objects in view: * * * second, it provides that they [customs officers] shall not be dispossessed of property seized by them under the laws of the General Government, without the authority of the courts of the United States. * * *

That statement seems clearly to reflect the understanding that the purpose of the provision was to protect the possession of

2. In contrast, an attempt to read into the "custody of the law" provision a purpose to create some kind of legal relationship between the court and the property—*i.e.*, to give the court "custody" of the property—leads only to the erection, without supporting foundation, of an elaborate and useless fiction. Clearly, of course, § 2463 does not affect the actual custody of the collector, who remains free, unless the court affirmatively intervenes, to release, sell, or otherwise dispose of the property without the permission of the court. And that being so, it is equally clear that the court cannot effectively exercise power over the property without first issuing process, either *in rem* or *in personam*. Nor is the court even aware of when its "custody" begins or ends. The "custody" claimed to have been given the court thus appears to have had no effect whatever and to have given the court no powers it did not already possess—other than the indirect effect now claimed of authorizing the court, once it does obtain actual jurisdiction of the property by process, to proceed summarily. And that there was no reason to create such a fictitious custody seems evident, since it was wholly unnecessary in order to achieve the only apparent purpose of the provision—namely, to protect the property against state process.

The form of the provision also seems inappropriate as a provision designed to give a court "cus-

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the customs officers as such—subject of course to the ordinary powers of the federal courts reserved by the last clause—and not to confer "custody" or special summary powers on the "courts.

tody" of the property, since it fails even to identify the court. If the omission be supplied by assuming that it means the court in whose territorial jurisdiction the property is located, problems would arise when the property is removed, as it may be without leave of court, to another jurisdiction: does the "custody" shift or does it remain in the original court, thereby depriving the court in the removed jurisdiction—which is otherwise the court "having jurisdiction thereof" within the meaning of the last clause of § 2463—of its power to act? In sum, we submit, the concept that property seized by revenue officials is automatically in the custody of a court is an altogether awkward, contrived, and useless fiction, to which there is no reason to think that Congress resorted.

3. The proper interpretation of the "custody of the law" clause becomes even clearer when the provision is read in its original context in the 1833 Act. Section 1 of that Act was a temporary provision, to be in effect until the end of the next session of Congress (§ 8), authorizing the President to use federal troops in aid of customs collections. That section, after authorizing the collector to seize and detain incoming vessels until the duties were paid, provided that "it shall be unlawful to take the vessel or cargo from the custody of the proper officer of the customs, unless by process from some court of the United States", and empowered the President to use military force "for the purpose of preventing the removal of such vessel or cargo, and protecting the officers of the customs in retaining the custody thereof." That sec-

tion made clear that the custody of the property so detained was in the customs officials and temporarily authorized the use of troops to protect that custody against any interference other than by process of the federal courts. Yet the same property was declared by § 2 (now § 2463) to be deemed "in the custody of the law". Under our interpretation of that phrase as simply giving to the collector's custody protection against interfering process, with the exception of the powers expressly reserved to the federal courts, the two sections are entirely consistent. They are identical in the substantive rules declared—the collector's custody is protected against all interference except by process of the federal courts—with § 2 permanently enacting those rules and § 1 temporarily authorizing the use of military force for their vindication. Under petitioner's interpretation, however, while Congress in § 1 protected the collector's custody as such—making it "unlawful" for anyone other than the federal courts to interfere with that custody—in § 2 it unaccountably abandoned that approach and, instead of directly protecting the collector's custody, found it necessary to declare a fictional custody in the courts and then protect the court's custody from state process. While § 1 remained in force, moreover, the two sections were simultaneously applicable, with the result, under petitioner's view, that the same property was at once declared to be in the legally-protected custody of the revenue officers (§ 1) and in the legally-protected custody of the courts (§ 2).

4. Our interpretation of the "custody of the law" provision—*i.e.*, as protecting the collector's custody rather than giving custody to the courts—appears to have been accepted by this Court in *In re Fassett*, 142 U.S. 479. There, the collector of customs had seized a vessel for payment of import duties. The owner promptly brought an *in rem* action in admiralty for the recovery of the vessel, and the marshal, under attachment process, seized the vessel from the custody of the collector. The collector sought in this Court a writ of prohibition against the admiralty proceedings, claiming that, since the vessel had been duly detained under the revenue laws, it was, under § 2463 (then R.S. 934), in the "custody of the law" and hence immune from attachment in the admiralty action. That is, it was claimed that the "custody of the law" provision so protected the collector's custody that the property was beyond the reach of process even of a federal court otherwise having jurisdiction. This Court, although rejecting the conclusion that the property was immune from federal process, on the ground that the statute expressly made it subject "to the orders and decrees of the" federal courts, accepted the premise that it was the collector's custody that was the "custody of the law," saying (p. 486):

> * * * while it [the vessel] was so in the custody of the law that it must continue to be detained by the collector, subject "only to the orders and decrees of the courts of the United States having jurisdiction thereof," it was subject to such orders and decrees.

It may be seen that the claims made in the name of "the custody of the law" have come full circle since the *Conquerer* was seized by collector Fassett for taxes. It was there claimed that the "custody of the law" put the property beyond the reach even of a federal court sitting in a plenary proceeding in which jurisdiction of the collector was obtained by personal service and jurisdiction of the property was sought to be obtained by attachment. It is now claimed that the same provision gives the *court* such uniquely total powers over the property that it may summarily dispose of it on motion, without the necessity even of a plenary action. In our view, petitioner's claim is no better founded than was Fassett's at the other extreme, and the correct view remains that first espoused by this Court: it is the collector's custody that § 2463 protects as "the custody of the law", but that custody is not immune from the otherwise competent process of the federal courts.

It must be admitted that some lower courts have assumed that the effect of the "custody of the law" provision was to bring the property within the custody of the court and thus in some way to enhance the court's powers over the property.[11] They did so, however, without even alluding to the possibility that

[11] That was clearly the basis for the Third Circuit decisions relied on by petitioner. *Raffaele* v. *Granger*, 196 F. 2d 620; *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178. The nature of the partial reliance on § 2463 in support of the limited summary proceedings allowed in *Standard Carpet Co.* v. *Bowers*, 284 Fed. 284 (S.D.N.Y.); *Gillam* v. *Parker*, 19 F. 2d 358 (E.D.S.C.); *In re Behrens*, 39 F. 2d 561 (C.A. 2); and *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (C.A. 2)—*i.e.*, for what purpose it was relied on and whether the reliance was on the

the phrase might have another meaning or to the implications of this Court's decision in *Fassett*. Nor does it appear that the parties raised the point. Perhaps part of the reason for the oversight was the codification of what is now § 2463 separately from the other provisions of the 1833 Act, for it is only in the context of the original statute that the true purpose and meaning of the provision become clear. Whatever the reason, however, those cases, in which the point was neither argued nor discussed, cannot be deemed authoritative decisions on the question. And in any event, they hardly militate against the controlling authority of this Court's decision in *In re Fassett*.

IV. THERE IS NO AUTHORITY FOR SUMMARY PROCEEDINGS EVEN IF THE PROPERTY BE DEEMED IN THE CUSTODY OF THE COURT

Even if petitioner's contention that "custody of the law" means "custody of the court" be accepted for purposes of argument, it does not follow that petitioner may proceed by motion in summary proceedings. Petitioner's claim that any property in the custody of the court is for that reason alone subject to the court's summary powers obviously claims too much and can be dismissed at once as untenable. That argument is based on the Third Circuit's assertion, without citation of authority, that "a plenary civil suit is not necessary to enable a court to exercise

"custody of the law" provision or the last clause of the section—is less clear, but those cases can be more satisfactorily explained on another ground (see *infra*, pp. 28-31 and note 11).

jurisdiction over property thus *in custodia legis.*" *Raffaele* v. *Granger,* 196 F. 2d 620, 623. When it is recognized that the prototype of property *in custodia legis* is property which has been attached or otherwise brought within the court's jurisdiction by process, it becomes evident that that statement cannot be maintained as a general principle, for it would mean that any action *in rem* or *quasi in rem* could be brought as a summary proceeding outside the Federal Rules of Civil Procedure. If petitioner's position can be sustained at all, therefore, it must be on some more limited ground than that asserted. We will show, however, that there is present here none of the elements that have traditionally been thought to justify summary proceedings.

We will confine the discussion to the circumstances in which summary powers have been exercised in aid of a claimant's right to recover property seized by government officials. The summary powers exercised in other contexts—*e.g.*, in bankruptcy proceedings (see *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U.S. 426)—seem *sui generis* and their development affords little guidance here. A distinction must also be drawn between the use of summary powers finally to adjudicate the rights to the property and their use for the limited purpose of precipitating a plenary action in which the rights may be determined, and the two classes of cases will be separately discussed.

A. THE LIMITED GROUNDS ON WHICH SUMMARY POWERS HAVE HISTORICALLY BEEN EXERCISED TO DETERMINE THE LEGALITY OF SEIZURES ARE NOT PRESENT HERE

Most of the cases allowing summary proceedings, by motion or otherwise, for the return of seized prop-

erty involved property that had allegedly been seized in violation of the Fourth Amendment and was being detained for use as evidence in criminal proceedings. A motion procedure for that purpose is now expressly authorized by Rule 41(e) of the Criminal Rules, but we may assume that the principles developed before the Rule was adopted continue to have vitality in other areas.

In allowing summary proceedings for the return of seized property, the courts have relied on what seem to be three distinct bases for the exercise of summary powers. None of them, as we shall show, is present here.

1. The ground most frequently relied upon is that the property, alleged to have been unlawfully seized, is in the possession of an "officer of the court" (usually, the United States Attorney) who is subject to the summary disciplinary powers of the court. *Cogen v. United States*, 278 U.S. 221; *Weeks* v. *United States*, 232 U.S. 383; *United States* v. *Gowen*, 40 F. 2d 593 (C.A. 2), affirmed on this point *sub nom. Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *United States* v. *Maresca*, 266 Fed. 713 (S.D.N.Y.). The summary power thus exercised, said to be based on "an elementary principle, depending upon the inherent disciplinary power of any court of record" (*United States* v. *Maresca*, *supra*, at p. 717), is analogous to the power summarily to punish officers of the court for contempt (cf. *Cammer* v. *United States*, 350 U.S. 399), and on occasion the two questions have been treated as being identical (*In re Chin K. Shue*, 199 Fed. 282 (D. Mass.)).

Government officials not themselves acting in a prosecutorial capacity, however, are not considered to be "officers of the court" in the sense required to submit them to the summary disciplinary powers of the court, and summary proceedings will not lie to recover property held by them in the absence of some other basis for summary action. *In re Behrens*, 39 F. 2d 561 (C.A. 2) (prohibition agent); *Applybe* v. *United States*, 32 F. 2d 873 (C.A. 9), rehearing denied, 33 F. 2d 897 (prohibition agent); *United States* v. *Hee*, 219 Fed. 1019 (D.N.J.) (revenue agent); *In re Chin K. Shue*, *supra* (customs agent); *Sims* v. *Stuart*, 291 Fed. 707 (S.D.N.Y.) (collector of customs); cf. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, holding that papers in the physical possession of a prohibition agent could be recovered in a summary proceeding on the grounds that the agent had participated, under the control of the United States Attorney, in the preliminary criminal proceedings before the Commissioner and subjected himself to the disciplinary powers of the court, and that the United States Attorney had effective control of the papers. Since the respondent here, the District Director of Internal Revenue, is not an "officer of the court" subject to the disciplinary powers of the court, those cases afford no basis for the summary proceeding here.

2. Where the motion for the return of illegally-seized property is made after an indictment or information has been filed, a further basis sometimes relied upon for permitting the motion procedure is that the proceeding is not an independent one but a "part" of

and ancillary to the criminal action that is already pending in the same court and thus no plenary action is required. *Cogen* v. *United States, supra; Applybe* v. *United States, supra; Weinstein* v. *Attorney General,* 271 Fed. 673 (C.A. 2); *United States* v. *Maresca, supra; United States* v. *Wilson,* 163 Fed. 338 (S.D. N.Y.). An analogous principle was invoked in *Krippendorf* v. *Hyde,* 110 U.S. 276, to allow a third party claiming ownership of property attached in a federal diversity action as property of the defendant to bring a "dependent" proceeding in the same court to protect its interest in the property without independently satisfying federal jurisdictional requirements, the Court noting in addition that the trial court might adopt any procedure appropriate to the resolution of the collateral title dispute without interfering with the main action.[12]

What comfort petitioner seeks to draw from *Krippendorf* (Br. 10) is not clear, since the very basis for the decision there was that the intervenor's application could be treated as a dependent part of the plenary action already pending, whereas here the proceeding is admittedly an independent one which must stand on its own feet.

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[12] The problem presented in *Krippendorf* has of course now been resolved by Rule 24(a)(3), permitting a third party so situated to intervene by motion in the pending action. In view of petitioner's apparent reliance on the suggestion in *Krippendorf* that the trial court might, if appropriate, use summary procedures to resolve the collateral title dispute, it is noteworthy that the Rules now require that the motion to intervene be accompanied by an appropriate pleading (Rule 24(c)), and proceedings thereon are fully governed by the Rules.

3. A third basis for summary proceedings for the return of illegally-seized property has occasionally been invoked where the property was seized under the purported authority of a search warrant issued by the court's authority—namely, that the court has inherent summary powers to control its own process and to prevent abuse of that process. *Weinstein* v. *Attorney General, supra; United States* v. *McHie,* 194 Fed. 894 (N.D. Ill.); cf. *United States* v. *Casino, supra.* But see *In re Chin K. Shue, supra.* That basis for summary action obviously can have no application here, since the levy was effected, not by judicial process, but by independent administrative process not requiring judicial aid for its execution.

B. THE EQUITABLE POWERS OF A COURT, ON MOTION, TO PREVENT DELAY IN THE COMMENCEMENT OF A REQUIRED PLENARY ACTION BY THE GOVERNMENT ARE INAPPLICABLE HERE

A quite different use of summary powers—not to adjudicate the claims to the property but to precipitate a plenary action in which they can be adjudicated—appears in cases in which the government has seized property for forfeiture or similar proceedings under a statute which is construed as making the forfeiture proceedings the exclusive procedure for the determination of any claims to the property. Since the owner cannot himself bring an action to recover his property but must await the commencement of the forfeiture proceedings by the government, he is left remediless during any delay by the government in bringing the required forfeiture proceedings. To prevent an unreasonable delay by the government, it was early held, following a dictum by Chief Justice Mar-

shall,[13] that the court that would have jurisdiction of the forfeiture proceedings could, on motion of the owner, require the government officials to institute the forfeiture proceedings without unreasonable delay or else abandon the seizure and return the property. *Church* v. *Goodnough*, 14 F. 2d 432 (D. R.I.); *Standard Carpet Co.* v. *Bowers*, 284 Fed. 284 (S.D.N.Y.); *Gillam* v. *Parker*, 19 F. 2d 358 (E.D.S.C.); *In re Behrens*, 39 F. 2d 561 (C.A. 2); *Goldman* v. *American Dealers Service*, 135 F. 2d 398 (C.A. 2); cf. *Margie* v. *Potter*, 291 Fed. 285 (D. Mass.) (return ordered when criminal prosecution, on which forfeiture depended, was dropped).

Although in a number of those cases (*Standard Carpet*, *Gillam*, *Behrens*, and *Goldman*) the court relied in part on § 2463,[14] we submit that the power does

[13] "* * * If the officer has a right, under the laws of the United States, to seize for a supposed forfeiture, the question, whether that forfeiture has been actually incurred, belongs exclusively to the federal courts, and cannot be drawn to another *forum*: and it depends upon the final decree of such courts, whether such seizure is to be deemed rightful or tortious. If the seizing officer should refuse to institute proceedings to ascertain the forfeiture, the district court may, upon the application of the aggrieved party, compel the officer to proceed to adjudication, or to abandon the seizure." *Slocum* v. *Mayberry*, 2 Wheat. 1, 9-10.

[14] For precisely what purpose § 2463 was cited in those cases is not clear. It seems to have been used primarily to overcome any doubt that, because the forfeiture proceeding to be brought by the government was the statutorily-exclusive remedy, the courts were without power to interfere in any way with the government's possession pending such a proceeding. That would explain the courts' seemingly main reliance on the last clause of § 2463 rather than the "custody of the law" provision (though the two were usually quoted together), using

not depend upon that provision but derives instead from the general equity powers of the court—as, indeed, is shown by Chief Justice Marshall's pre-§ 2463 dictum in *Slocum* v. *Mayberry* and the primary reliance on that dictum in the formative *Gillam* and

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that clause in essentially the same way that it was used in *In re Fassett* (*supra*, p. 21)—*i.e.*, since the last clause expressly made the officials' possession of the property "subject only to the orders and decrees" of the federal courts, they could not claim complete immunity from the process of the federal courts pending the forfeiture and were subject to whatever orders the courts otherwise (*i.e.*, under *Slocum*) had power to enter.

The ambiguity of the reliance on § 2463 arises largely from a failure to separate the several questions involved. In each case, the owner had prayed for a determination on the merits that the seizure was wrongful and a return of the property. The courts first held that no summary proceeding would lie for that purpose, both because such questions could be determined only in a plenary suit and because a forfeiture proceeding by the government was the exclusive remedy. It was then held, however, that the owner was not denied all relief, for the courts did have power to require prompt commencement of the forfeiture proceeding. At that point there logically remained a separate procedural question—*i.e.*, whether an application even for the limited relief of requiring a forfeiture proceeding to be brought had to be made in a plenary action, or could be made by motion. That question, however, seems never to have been separately discussed and appears not to have been a real issue in those cases. The explanation, we suggest, is that it was accepted by all that, if the court did have power to direct the government to institute a forfeiture proceeding, the proper way to seek that relief would be by a motion to require the government to show cause for its delay—if only to avoid the evident and fruitless circuity of requiring a plenary action simply to cause another plenary action to be brought. Hence, we submit, the reliance on § 2463, although not clearly articulated, was only in support of the power of the court to grant the relief at all and not on the procedural question of the form in which the application should be made.

Behrens cases. As explained by the court in the *Church* case, which placed no reliance on § 2463, the seizing officers are required by statute promptly to institute judicial proceedings for the condemnation of the property, and under general equitable principles, if not indeed to satisfy the requirements of due process, the court in which the proceedings are required to be brought must also have the power to require that they not be delayed indefinitely while the owner is deprived of a hearing. A summary proceeding, not to obtain final relief, but for the limited purpose of requiring a plenary action to be instituted, can, moreover, be viewed as being not an "independent" proceeding but simply a preliminary step in the institution of the plenary action and in that sense ancillary to the suit sought to be precipitated. Or, finally, the unjustified delay of the government officials in bringing the required judicial proceedings can perhaps be viewed as an abuse of judicial process and hence subject to a summiary power in the court to prevent abuse of its processes.

Whatever the rationale, however, it is patent that the power thus exercised to precipitate a statutorily required proceeding by the government in deference to which other remedies have been foreclosed to the claimant can have no application here. Petitioner seeks, not to have a plenary suit commenced by the government—and the statute requires none—but to have its claims finally adjudicated in the summary proceeding itself. Nor does it claim that it is not equally able to seek the same relief by a plenary suit; it claims only that it is entitled to the added proce-

dural advantages of a summary proceeding. Petitioner's claim, in short, is the very antithesis of the basis for summary proceedings to require institution of a plenary suit by the government and it can draw no support from the cases granting such relief.[15]

V. PETITIONER HAS SHOWN NO REASON FOR DEPARTING FROM THE PROCEDURES PRESCRIBED BY THE FEDERAL RULES OF CIVIL PROCEDURE

We have thus far sought to show that there is no basis for a summary proceeding in this case quite apart from the effect of the Federal Rules of Civil Procedure. In the end, however, perhaps the most important consideration in this case is the integrity of the Federal Rules, and in our view the Rules would be controlling here even if there were some basis in the pre-Rules practice for a summary proceeding.

With stated exceptions (Rule 81) not applicable here, the Rules "govern the procedure * * * in all

[15] Of course in those cases the courts' orders were in the form of requiring the government to return the property *unless* it commenced forfeiture proceedings within a stated period, but the conditional order for the return of the property was imposed only as a sanction to require prompt proceedings and was not based on an adjudication on the merits. Petitioner's contention that if the courts have summary power to order the return of property conditionally they must also have such power, in their discretion, to adjudicate the claims to the property and order its return absolutely (Br. 7–10) reflects a uniquely motolithic concept of judicial powers and ignores the very object for which summary powers were exercised in those cases. Summary powers were used there in aid of the claimant's right to have plenary consideration of his claims in a plenary suit; they are invoked here to have plenary and final adjudication of the claims in the summary proceeding itself. They were exercised there to precipitate, here to short-circuit, a plenary suit.

suits of a civil nature" (Rule 1), prescribe that there "shall be one form of action to be known as 'civil action'" (Rule 2), and direct that such an action be commenced by filing a complaint (Rule 3). The term "suits" as used in Rule 1 seems sufficiently broad to include any independent proceeding by which judicial relief is sought, whether traditionally brought in a summary or plenary form, and thus to permit no exceptions to the procedures prescribed by the Rules other than those expressly provided for. In our view, however, it is not necessary now to say that there is no circumstance in which a summary proceeding not expressly excepted from the Rules could be brought,[16] for even if the possibility of an implied exception be assumed no possible justification for such an exception has been shown here.

The Rules were designed as a uniform code of procedure for the federal courts, adequate, with the flexibility which they themselves provide, "to secure the just, speedy, and inexpensive determination of every action" (Rule 1). And the value of the Rules lies not only in the utility of their provisions for the orderly conduct of a lawsuit, but also in the predictability and universality of their application. If those underlying policies are to be served, it is essential, we think, that implied exceptions to the controlling force of the Rules be allowed, if at all, only upon the most

[16] While we doubt its existence, we are not now prepared to assure the Court that there is no circumstance that can arise in which it would be clearly inappropriate to require the procedures of a plenary action to be followed. Since it seems unnecessary for purposes of this case, we see no reason now to foreclose that possibility.

compelling showing of the necessity and justification for departure. Cf. *United States* v. *Robinson*, No. 16, this Term, decided January 11, 1960.

The proceeding in this case is neither more nor less than a typical action to resolve a title dispute between adverse claimants to property and, as such, seems clearly to be a "suit" in every accepted meaning of the word. Even if, before the Rules, it could have been maintained as a summary proceeding because of some fictional judicial "custody," such a fiction by itself affords no justification for departing from the procedures prescribed by the Rules as those most appropriate for the resolution of all similar disputes. Nor has any other reason been suggested by petitioner for singling out this class of cases for special treatment.

It may be noted, finally, that the flexible procedures provided by the Rules seem fully adequate to meet whatever legitimate claims for expedition petitioner may have. If there are no issues of fact—which cannot be determined from the present pleadings—petitioner could in a civil action move for summary judgment 20 days after its complaint was filed, a hearing could be held 10 days later, and judgment could issue "forthwith" (Rule 56).[17] Those procedures were designed to afford the very expedition that petitioner seeks, and if they are inadequate petitioner has failed to say why. If, on the other hand, there are issues of fact to be tried, no reason appears why the procedures provided by the Rules are not those best suited to resolve them.

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[17] In addition, of course, there are even more summary procedures for interim injunctive relief pending final adjudication. See Rule 65.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed, without prejudice, on remand of the case to the district court, to petitioner's requesting that court to treat the "petition" filed in the cause as a complaint in a civil action and to proceed with the action in accordance with the Federal Rules of Civil Procedure.

Respectfully submitted.

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FEBRUARY 1960.

APPENDIX

1. 28 U.S.C. 2463 provides:

> SEC. 2463. All property taken or detained under any revenue law of the United States shall not be replevinable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

2. The Act of March 2, 1833, 4 Stat. 632, provided in part:

> SEC. 1. Whenever, by reason of unlawful obstructions, combinations, or assemblages of persons, it shall become impracticable, in the judgment of the President, to execute the revenue laws, and collect the duties on imports in the ordinary way, in any collection district, it shall and may be lawful for the President to direct that the custom-house for such district be established and kept in any secure place within some port or harbour of such district, either upon land or on board any vessel: and, in that case, it shall be the duty of the collector to reside at such place, and there to detain all vessels and cargoes arriving within the said district until the duties imposed on said cargoes, by law, be paid in cash, deducting interest according to existing laws; and in such cases it shall be unlawful to take the vessel or cargo from the custody of the proper officer of the customs, unless by process from some court of the United States; and in case of any attempt otherwise to take such vessel or cargo by any force, or combination, or assemblage of persons too great to be overcome by the officers of the customs, it shall and may be lawful for the President of the United States, or such person

or persons as he shall have empowered for that purpose, to employ such part of the land or naval forces, or militia of the United States, as may be deemed necessary for the purpose of preventing the removal of such vessel or cargo, and protecting the officers of the customs in retaining the custody thereof.

SEC. 2. The jurisdiction of the circuit courts of the United States shall extend to all cases, in law or equity, arising under the revenue laws of the United States, for which other provisions are not already made by law; and if any person shall receive any injury to his person or property for or on account of any act by him done, under any law of the United States, for the protection of the revenue or the collection of duties on imports, he shall be entitled to maintain suit for damage therefor in the circuit court of the United States in the district wherein the party doing the injury may reside, or shall be found. And all property taken or detained by any officer or other person under authority of any revenue law of the United States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. And if any person shall dispossess or rescue, or attempt to dispossess or rescue, any property so taken or detained as aforesaid, or shall aid, or assist therein, such person shall be deemed guilty of a misdemeanour, and shall be liable to such punishment as is provided by [§ 22, Act of April 30, 1790] for the wilful obstruction or resistance of officers in the service of process.

SEC. 3. In any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by

such officer, or other person under any such law of the United States, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States; * * *; which petition, affidavit and certificate, shall be presented to the said circuit court, * * * and the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court * * *.

* * * * *

SEC. 5. Whenever the President of the United States shall be officially informed, by the authorities of any state, or by a judge of any circuit or district court of the United States, in the state, that, within the limits of such state, any law or laws of the United States, or the execution thereof, or of any process from the courts of the United States, is obstructed by the employment of military force, or by any other unlawful means, too great to be overcome by the ordinary course of judicial proceeding, or by the powers vested in the marshal by existing laws, it shall be lawful for him, the President of the United States, forthwith to issue his proclamation, declaring such fact or information, and requiring all such military and other force forthwith to disperse; and if at any time after issuing such proclamation, any such opposition or obstruction shall be made, in the manner or by the means aforesaid, the President shall be, and hereby is, authorized, promptly to employ such means to suppress the same, and to cause the said laws or process to be duly executed, as are authorized and provided in the cases therein mentioned by the [Acts of February 28, 1795 and March 3, 1807].

3. Sections 6331 and 6332 of the Internal Revenue Code of 1954 (26 U.S.C.) provide in part:

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

* * * * *

4. Rules 1–3 of the Federal Rules of Civil Procedure provide:

RULE 1. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in

equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

RULE 2. There shall be one form of action to be known as "civil action".

RULE 3. A civil action is commenced by filing a complaint with the court.

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OCTOBER TERM, 1959

No. 339

NEW HAMPSHIRE FIRE INSURANCE CO.,
Petitioner,

vs.

SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New Hampshire Fire Insurance Co.

Supreme Court of the United States

OCTOBER TERM, 1959

NEW HAMPSHIRE FIRE INSURANCE CO., *Petitioner*, *vs.* SCANLON, DISTRICT DIRECTOR OF INTERNAL REVENUE, *et al.*, *Respondents.*	No. 339

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The Erroneous Assumptions in Respondent's Brief

It is respectfully submitted that Respondent's brief makes a series of erroneous assumptions and begs the questions presented.

This is not an action against the United States and not an action against a "collector" or a "revenue official". This is an application to the court to order the return from its custody of property allegedly "taken or detained" by an individual tortfeasor who happens to be a revenue official and purports to have acted under a "revenue law".

If Respondent was, in fact, acting within the scope of his authority as a revenue official in detaining Petitioner's property, we would concede that this proceeding could not be sustained. On the other hand, if Respondent admittedly acting "administratively" and without judicial sanction

(Resp. Br. p. 8) has seized or detained the property of a non-taxpayer, then he is plainly a mere individual tortfeasor and in the absence of Section 2463, no basis for federal jurisdiction suggests itself. If this were an action against Respondent there would be no diversity of citizenship and the action would not appear to "arise under" any federal law. *Maule Industries v. Tomlinson*, 244 F. 2d 897 (5th Cir. 1957); *Johnston v. Earle*, 245 F. 2d 793 (9th Cir. 1957).

What, then is the basis of federal jurisdiction? The answer would appear to be the power of a court to exercise control over property placed in its custody. Section 2463 gives custody to the federal courts of property seized under the alleged authority of the revenue laws where the owner alleges that the property was not in fact seized under those laws.

In express language not the alleged "collector" but the detained property is made subject to the orders and decrees of the federal courts. Congress, in enacting Section 2463, clearly sought to strike a balance between the power to enforce the revenue laws by extra-judicial seizures and the right of an owner to recover property seized, without authority, by one claiming to be acting under the revenue laws.* And, in substance, the remedy given to the aggrieved non-taxpayer was to petition the federal court "having jurisdiction thereof" to order the return of his property

*Despite respondent's contention to the contrary (Resp. Br. p. 14, fn. 9), it seems clear that Congress, when it enacted the forerunner of Section 2463, was in a "compromising mood". IX Gide and Seaton, Register of Debates in Congress, 244 *et seq.* (1833) is replete with references which indicate the Congressional desire to minimize South Carolina's contentions that the bill represented a form of tyranny.

E.g., Senator Wilkins, who reported the bill from the Committee on the Judiciary:

> "* * [T]he bill was made general and sweeping, in its terms and application, for the reason that this course was thought to be more delicate in regard to the State concerned." (p. 247)
>
> "The object of this section [the section containing what is now

from its custody. The court "having jurisdiction" is thus naturally the court for the district in which the property is located. *Raffaele v. Granger*, 196 F. 2d 620, 623 (3d Cir. 1952) and cases there cited. Plainly, jurisdiction does not lie in the district in which the alleged tortfeasor might be found since there is not an action against the tortfeasor but merely an application to the court as the custodian of the property for its return.

The Case of IN RE FASSETT

We are at a loss to understand Respondent's reliance on *In re Fassett*, 142 U. S. 479 (Resp. Br. pp. 21-23). This case seems to us to be precisely contrary to the proposition for which it is cited by Respondent, viz. that Section 2463 protects the "collector's custody" rather than the "custody [of] the courts". In *Fassett*, after the vessel had been seized by the collector for the enforcement of the payment of duties upon her, the owner filed a libel in the District Court and in due course the marshal took possession of the vessel, thus taking it away from the "collector's custody". Part of the relief sought by the collector in the District Court was "restitution of the vessel to the collector" (*Fassett* p. 483).

The collector then moved in this Court for a writ of Prohibition to the District Judge to prohibit him from proceeding with the libel. The writ was denied, thus confirming the removal of the vessel from the custody of the collector.

The collector contended that when, as collector, he took possession of the yacht and decided that she was dutiable,

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§2463] is to meet legislation by legislation. There is nothing in this provision shocking or harsh." (p. 259)

Since Congress clearly did not desire to punish South Carolina or increase state-federal friction, it seems reasonable to conclude that Congress wished to provide in the federal courts relief as expeditious as was available in state courts.

the only remedy open to her owner was to pay under protest the duties assessed upon her, and in that way secure possession of her, with the right thereafter to sue for a refund of the duties. This contention was, of course, rejected by this Court which pointed out that "The libel presents for the determination of the district court, as the subject matter of the suit, the question whether the yacht is an imported article, within the meaning of the customs revenue laws". (Fassett p. 483 r.

The quotation from Fassett reproduced in Respondent's Brief, p. 21, allegedly to show that "This Court** accepted the premise that "custody of the law" means "protecting the collector's custody rather than giving custody to the courts", does not, we submit do any such thing. On the contrary, we believe the quotation confirms that the "custody" involved is the custody of the courts. The quotation is as follows:

> "* * * while it [the vessel] was so in the custody of the law that it must continue to be detained by the collector, subject only to the orders and decrees of the courts of the United States having jurisdiction thereof, it was subject to such orders and decrees."

Patently the "custody of the courts" in virtually every case where provision therefor is made would be constructive rather than actual. Pending the determination of the merits, the physical property involved must be kept somewhere, but as the quotation affirms, it is the property, rather than any particular person that is "subject to the orders and decrees of the court".

A single illustration, we believe, will show the fatal weakness of a contention that it is the "collector's custody" that is to be "protected". Suppose the collector were concededly a dishonest person and, having with felonious intent, seized a non-taxpayer's negotiable securities, resisted the removal of the property from his possession on the ground he was a "collector" and was protected in posses-

sion until a "plentary civil suit" should be instituted against him and duly tried. Could there be any doubt that the court having custody would have the power summarily to order the property to be transferred to safer custody?

In the ordinary case, of course, the honesty of the collector is not doubted and, therefore, there is no objection to his retaining physical custody. We submit, however, that the constructive custody is at all times in the court whether the actual custody is in the collector or somewhere else.

Irrelevance of Other "In Rem" Actions

Finally, we believe that it is of no significance that in certain *in rem* or *quasi in rem* actions the plaintiff is not entitled to seek the return of his property by means of a summary proceeding. (Resp. Br. p. 24). Where specific procedures have been prescribed for the determination of the issues raised, in particular actions such procedures would naturally control. In the instant case, no specific procedure is defined by the statute. And, for the reasons above stated, we submit it was the unmistakable intention of Congress that an aggrieved petitioner complaining that his property had been seized without statutory warrant and without judicial sanction by an alleged "collector", should not be required to abide by the time requirements applicable to the general run of cases, but should have the right to come directly before the court in whose custody the property has been placed and to have it returned to him at the earliest possible time consistent with due process.

Respectfully submitted,

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